No. 2337

United States

Circuit Court of Appeals

For the Ninth Circuit.

M. C. WOOD,

Plaintiff in Error,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

W. H. PLUMMER, Old National Bank Building, Spokane, Washington,
Attorney for Plaintiff in Error.

CANNON, FERRIS & SWAN, Old National Bank Building, Spokane, Washington,
Attorneys for Defendant in Error. [1*]

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains of defendant and for cause of action alleges:

I.

That plaintiff is a resident and citizen of the State of Washington.

II.

That defendant is now, and was at all times herein mentioned, a corporation, created, organized and existing under and by virtue of the laws of the State of Maine, and a citizen of the State of Maine, and carrying on a large lumber and sawmill business at Potlatch, State of Idaho.

*Page number appearing at foot of page of original certified Record.

III.

That on, and for some time prior to the 21st day of September, 1911, plaintiff was in the employ of defendant with a gang of men engaged in repairing a certain brick structure connected with, and used by said defendant as a part of the sawmilling plant, said brick structure being a part of what is known as a burner, to which is conveyed certain waste materials for the purpose of being burned and destroyed, and plaintiff was employed and carrying on the duties exclusively of making and mixing mortar for the laying [2] of brick in repairing said brick wall, and at no time did he have anything to do with any other part of the work in and about said sawmilling and lumber plant and business.

IV.

That he was under the charge of a certain foreman employed by defendant by the name of Nelson who had charge of said plaintiff and the gang of men with whom plaintiff was employed and working.

V.

That as one of the appliances of said sawmilling plant there was constructed and used an apparatus known as a conveyor, being a long endless chain structure constructed and set up in such a manner so that the slabs and waste material could be, by the operation of said endless chain, conveyed from said sawmill a considerable distance from said mill, the same being built on an incline so as to carry forward said slabs and waste materials out to the burner where said slabs and waste materials were burned; that the top, floor and platform of said structure was

about 35 feet above the ground and place where plaintiff was performing his duties for said defendant.

VI.

That alongside of and beneath said conveyer there was certain passageways upon the ground which was provided and constantly used for and by men and teams in going to and from certain parts of said sawmilling plant for various purposes.

VII.

That a short time before the injury to plaintiff hereinafter complained of a certain gang of men in the employ of defendant, including the foreman thereof, was to work, and required to work upon said floor and platform of [3] said structure immediately above and over the passageways where plaintiff and other employees were required to constantly pass, and said gang of men was required to and engaged in handling and using certain heavy timbers, building and tearing down certain scaffolding and structures, and using and handling certain heavy timbers, boards and lumber in the repairing of said conveyer.

VIII.

That plaintiff had no knowledge of said gang of men working on said conveyer and structure up, over and above the said passageway where he, the said plaintiff, and other employees were required to and did perform their duties in going to and from certain places in and about their work.

IX.

That defendant negligently and carelessly failed

to warn plaintiff of said men working upon said structure at said point, or inform them of the danger thereof, and defendant failed in any manner to give any warning thereof, or to place any barrier or anything upon or near the ground under said conveyer where plaintiff would be and could be informed of the men working above him, and warn him and prevent him from passing thereunder while said men were working upon said conveyer.

X.

That defendant carelessly and negligently put said gang of men to work upon said conveyer above where plaintiff was required to perform his duties in going thereunder, defendant knowing that it was dangerous for plaintiff to pass under said structures at said place and under where said men were working as had been his custom and habit so to do, and defendant by putting said men to work upon said structure at said place without giving plaintiff any warning thereof or the danger incident thereto, carelessly and negligently failed [4] and neglected to furnish and maintain said passageway under said structure and the place where plaintiff was required to and did perform his duties, reasonably safe.

XI.

That in the performance by plaintiff of his duties in the mixing of mortar and using the necessary materials therefor, he was walking along said passageway upon the ground under said conveyer and under the place where said Finnell and his men were working, plaintiff having gone to the boiler-room to secure some lime and was returning therefrom, and with-

out any warning to plaintiff, and without knowledge on his part of any danger or the intent on the part of said Finnell, the foreman in charge of said gang of men upon said conveyer platform, said defendant, through its agent and servant, the said Finnell, carelessly, negligently and recklessly threw down upon plaintiff a large stick of timber about eight feet long and four inches by six inches in thickness and width, which he, the said Finnell, had been using in the repair of said conveyer, striking plaintiff upon the head, from which he sustained serious and permanent injuries as hereinafter mentioned.

XII.

That in doing and performing the things hereinbefore mentioned on the part of said defendant through its said Foreman Finnell, and the throwing of said timber down upon plaintiff, as aforesaid, defendant negligently and carelessly failed to use reasonable care in furnishing to plaintiff a reasonably safe place in which to perform his duties, and failed and neglected to keep said place reasonably safe, to the end that plaintiff might and could perform his duties with reasonable safety, and said defendant, as aforesaid, failed and neglected to use reasonable care in doing and performing the matters and things being done and performed by said Finnell and the gang of men under him while working upon [5] the platform alongside of said conveyer, and failed in every manner to use reasonable care in said operation, to the end that plaintiff should not be injured, and negligently and carelessly placed said gang of men to work handling timbers and lumber immediately

above where plaintiff was required to and did perform his duties without in any manner warning plaintiff of said dangerous conditions or used reasonable care in constructing barriers across and under said structure so as to prevent the same from being used by plaintiff as was previously customary.

XIII.

That previous to the injury to plaintiff, and previous to the throwing down upon him of said heavy stick of timber, said gang of men under the directions and orders of said defendant threw down four or five other planks or timbers, the same striking the ground close to the place where said stick of timber struck the plaintiff, and the work and the throwing down of said lumber and timber previous to the injury to plaintiff was well known, ordered to be done, and performed under the direction of said defendant, well knowing that the doing of said acts would cause said passageway to be unsafe to plaintiff and to others who were required to use the same in the performance of their duties in pursuance to the custom and usage previously existing and carried on.

XIV.

That the said piece of timber being thrown down upon the head of plaintiff, as aforesaid, by defendant, carelessly and negligently, struck plaintiff upon his head, causing a very severe laceration, causing a fracture of the skull bone, which caused him to be unconscious for some time immediately thereafter, and causes constant and extreme pains in the back of his neck, headache, dizziness and extreme nervousness, causing impairment of his sight, and a complete

and [6] extreme shock to his nervous system, and extreme physical weakness and lack of power and strength.

Over the occipitoparietal bones there is a scar about two and a half inches long with a slight depression of the bone, giving evidence of a probable fracture of the skull at that point. The inner table being depressed so as to impinge the membranes of the brain, keeping up a constant irritation of the nerve centers. The pupillary reflex is below normal and his sight very much impaired. Hearing is below normal. Pressure all along the cervical vertebra; there is evidence of irritation with intense pain, said pain being constant. The patellar reflex is exaggerated, ankle-clonus normal. The triceps or "el*bone* jerk" little exaggerated. There is pain in sacral region upon deep pressure.

His condition is that of a neurasthenic, with extreme weakness of the nerve centers, as a result of which they become less tolerant of external impressions, with loss of co-organization, fatigue and disordered mental state.

Under the best possible conditions he will not improve in many months or be able to follow his usual avocation. If improvement does not take place soon, it will be necessary for him to undergo an operation to raise the bone to relieve the pressure upon the brain before he can fully recover. His case is a very doubtful one so far as complete recovery is concerned under any circumstances.

XV.

That plaintiff is informed and believes, and there-

fore states to be a fact, that his condition is permanent. That he remained in the hospital at Palouse, Washington, for a period of two months, and for sixteen days in the hospital at Spokane, suffering extreme and excruciating pain, and has continued to suffer said pain and weakness ever since. That he is informed and believes, and therefore states to be a [7] fact, that his spinal cord extending down the back of the neck from the base of the brain is greatly shocked and injured, which is permanent.

XVI.

That by reason of the *careless* and negligence of defendant, its agents and servants, as hereinbefore pleaded, and the injuries received by plaintiff, the pain, suffering and physical condition caused by said injuries, and said negligence plaintiff has been damaged in the sum of Twenty Thousand Dollars ($20,000.00), no part of which has been paid.

WHEREFORE, plaintiff demands judgment against the above-named defendant for the sum of Twenty Thousand Dollars ($20,000.00), and his costs and disbursements herein.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff. [8]

State of Washington,
County of Spokane,—ss.

M. C. Wood, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and that the same is true, as he verily believes.

(Signed) M. C. WOOD.

Subscribed and sworn to before me this 22d day of September, 1912.

[Seal] (Signed) W. H. PLUMMER,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Complaint. Filed in the U. S. District Court for the Eastern District of Washington, October 24, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy. [9]

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Answer.

Comes now the defendant in the above-entitled action, and for answer to the complaint of plaintiff herein alleges:

I.

Admits paragraphs 1 and 2 of said complaint to be true.

II.

Defendant denies each and every other allegation, matter and thing contained in said complaint, whether as therein stated or otherwise, except it admits that at the time and place stated, plaintiff was

in some manner injured while in the employ of the defendant, but states that it has not sufficient knowledge or information to form a belief as to the nature and extent of said injuries.

FOR A FIRST AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action, defendant shows to the Court:

1. That plaintiff's injuries, if any, were caused solely and alone by his own carelessness and negligence in failing to take proper precaution for his own safety, and in going into a place of danger, where there was no necessity for him to be, with full knowledge of such dangers. [10]

FOR A SECOND AND AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action, defendant shows to the Court:

1. Plaintiff, in undertaking the work, in which he was then and there engaged, assumed and took upon himself all dangers and risks, incident to the work, in which he was employed, including the dangers and risks of being struck by pieces of boards or timber, which were being thrown to the ground by the men working upon the platform above him, and that he had full knowledge and notice of all such risks and dangers.

FOR A THIRD AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action, defendant shows to the Court:

1. That if plaintiff's injuries were in any manner caused or contributed to by the negligence of anyone except himself, the same was caused or contributed to by his fellow-servants, who were then and there

working with or about him and for whose negligence this defendant is not in any manner responsible.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that the defendant have judgment for its costs and disbursements herein.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant. **[11]**

State of Washington,
County of Spokane,—ss.

C. E. Swan, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the Potlatch Lumber Company, a corporation, defendant above named, and makes this affidavit for and on behalf of said Company for the reason and upon the ground that none of the officers of said Company are now within the State of Washington and County of Spokane; that he has read the foregoing answer, knows the contents thereof, and the same is true as he verily believes.

(Signed) C. E. SWAN.

Subscribed and sworn to before me this 13th day of November, 1912.

[Seal] (Signed) G. M. FERRIS,
Notary Public for State of Washington, Residing at Spokane, Washington.

[Endorsements]: Due service of within answer by receipt of a true copy thereof admitted this 13th day of November, 1912.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff.

Answer. Filed in the U. S. District Court for the Eastern District of Washington, November 14, 1912. W. H. Hare, Clerk. By S. M. Russell, Deputy. [12]

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Reply.

Comes now the above-named plaintiff and replying to the affirmative matter pleaded in defendant's answer:

I.

Denies each and every fact, matter and thing contained in defendant's "FIRST AFFIRMATIVE ANSWER AND DEFENSE" to plaintiff's alleged cause of action.

II.

Denies each and every fact, matter and thing contained in defendant's "SECOND AFFIRMATIVE ANSWER AND DEFENSE" to plaintiff's alleged cause of action.

III.

Denies each and every fact, matter and thing contained in defendant's "THIRD AFFIRMATIVE ANSWER AND DEFENSE" to plaintiff's alleged cause of action.

IV.

And denies each and every fact, matter and thing alleged in said answer not expressly hereinbefore admitted to be true in plaintiff's complaint.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff. [13]

State of Washington,
County of Spokane,—ss.

W. H. Plummer, being first duly sworn, deposes and says: That he is the attorney for the plaintiff in the above-entitled action; that he makes this verification on behalf of plaintiff for the reason that said plaintiff is temporarily outside of the State. That he has read the foregoing reply, knows the contents thereof, and that the same is true, as he verily believes.

(Signed) W. H. PLUMMER.

Subscribed and sworn to before me this 19th day of November, 1912.
[Seal]

(Signed) GERTRUDE KENDRICK,
Notary Public in and for the State of Washington,
Residing at Spokane.

[Endorsements]: Service admitted this 20th day of November, 1912.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

Reply. Filed in the U. S. District Court for the Eastern District of Washington, February 6, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [14]

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury in the above-entitled case, find for the plaintiff and assess the amount of his damages at the sum of Five Thousand ($5,000.00) Dollars.

(Signed) R. A. GROVES,
Foreman.

[Endorsements]: Verdict. Filed in the U. S. District Court for the Eastern District of Washington, April 15, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [15]

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Judgment.

This cause coming on for trial upon the issues raised by the pleadings before the court and a jury sworn to try the cause in due form, on the 14th day of April, 1913, the above-named plaintiff appearing in person and by W. H. Plummer, his attorney, and defendant appearing by Cannon, Ferris & Swan, its attorneys, and after hearing all the evidence in said cause and the instructions of the Court the jury retired to consider their verdict, and on, to wit, the 15th day of April, 1913, returned their verdict into court in favor of plaintiff and against defendant, awarding plaintiff damages in the sum of Five Thousand ($5,000.00) Dollars, and the Court being fully advised in the premises and upon the verdict of said jury and the law and evidence in said cause

It is hereby ORDERED and ADJUDGED: That plaintiff, M. C. Wood, do have and recover of and from the above-named defendant the Potlatch Lumber Company, the sum of Five Thousand ($5,000.00) Dollars, and his costs and disbursements herein.

Done in open court this 16th day of April, 1913.

(Signed) FRANK H. RUDKIN,
Judge. [16]

[Endorsements]: Service admitted this 16th day of April, 1913.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

Judgment. Filed in the U. S. District Court for the Eastern District of Washington, April 16, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [17]

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Motion for Judgment Non Obstante Veredicto.

Comes now the above-named defendant and moves and prays the Court for an order granting to it judgment in its favor, and against the plaintiff herein, notwithstanding the verdict rendered in favor of the plaintiff and against the defendant on a former day of the present term of this court, to wit, on the 15th day of April, 1913, because there is no substantial evidence to authorize or justify said verdict or judgment thereon in behalf of plaintiff and against this defendant for the reason that the testimony in said cause fails to show that the defendant was guilty of any negligence whatever in the premises, and that it was in any way the proximate cause of plaintiff's injury; that the evidence introduced upon the trial of said cause shows that the dangers and risks incident to doing the work, in which the plaintiff was engaged at the time of the accident, were open and obvious and of such character that the plaintiff assumed the same as a matter of law; that the evidence introduced upon the trial of said cause showed that the plaintiff was guilty of contributory

negligence as a matter of law in passing under the conveyor or platform upon which the men were at work throwing down timbers, without first ascertaining [18] whether or not it was safe for him to do so. That the evidence introduced upon the trial of said cause shows conclusively that at the time said timbers were thrown down by the men working upon the platform or conveyor, a warning was given to plaintiff and others on the ground below that said timbers would be thrown down and to look out. That the evidence introduced upon the trial of said cause shows conclusively that if plaintiff's injury was caused by and through the negligence of anyone other than himself, that it was caused by and through the negligence of his fellow-servant R. C. Finnell, for whose negligence the defendant is in no way responsible. That the evidence shows conclusively that plaintiff was at all times fully aware of the fact that the men were at work upon the conveyor or platform and that he had the same knowledge, or means of knowing, that said men were about to throw or would throw down timbers *as* the defendant, and that therefore he assumed any and all risks incident in passing under said conveyor or platform while the men were working thereon. That the evidence fails to show that the defendant or anyone acting for it in the capacity of a vice-principal had any knowledge or notice that the timbers were thrown, or about to be thrown, to the ground by the fellow-servants of plaintiff working upon the conveyor or platform, but, on the contrary, the evidence conclusively shows that the defendant and its officers and agents other than the plaintiff's fellow-servants who threw down

the said timbers had no such knowledge or notice and no reason to anticipate that said timbers would be so thrown; that upon the whole of the testimony introduced in said cause the defendant is entitled to the entry of judgment in its favor.

This motion is made and based upon the records and files in said cause, the minutes of the court and the stenographic report of the evidence upon the trial of said cause. [19]

In the event this motion is denied, and not otherwise, then the defendant prays the Court to hear and consider its petition for a new trial to be hereafter served and filed herein.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

[Endorsements]: Due service of within motion by receipt of a true copy thereof admitted this 16th day of April, 1913. Motion for Judgment *Non Obstante Veredicto.* Filed in the U. S. District Court for the Eastern District of Washington, April 16, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [20]

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. C. WOOD,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Stipulation [Waiving Want of Power in Court to Grant Motion for Judgment Non Obstante Veredicto etc.].

THAT WHEREAS, two trials before the Court and a jury have been had in the above-entitled cause, the first resulting in a dismissal of said action by the Court, and the second resulting in a verdict awarding plaintiff the sum of Five Thousand ($5,000.00) Dollars damages on which verdict judgment has been entered; that prior to the submission of the case to the jury the defendant moved for a directed verdict in its favor; that after the verdict was rendered defendant filed and served a Motion for a New Trial and also for judgment *non obstante veredicto* upon the grounds that the defendant upon the undisputed testimony is not liable, for the reason that the injuries to plaintiff were not caused by any negligence of the defendant, but on account of the plaintiff's own negligence and because of the negligence of a fellow-servant; and

WHEREAS, after the making of said motions and before the hearing thereof, the United States Supreme Court in effect held that this court had no power to grant judgment *non obstante veredicto;* and

WHEREAS, said motions are now pending and undetermined and it is desired by all the parties hereto that the necessity of going through another trial be avoided; [21]

IT IS THEREFORE STIPULATED AND AGREED by and between the parties hereto that the want of power in said court under the law to grant said motion for judgment *non obstante veredicto* is

waived by the parties hereto and the power conceded to the court.

That in the event this court shall render judgment herein for the defendant and should said judgment be reversed by the Circuit Court of Appeals, the original judgment which has been entered in this cause in favor of the plaintiff in the sum of Five Thousand ($5,000.00) Dollars shall be reinstated in this court.

Dated this 4th day of October, A. D. 1913.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

[Endorsements]: Stipulation Waiving Want of Power of Court to Grant Motion for Judgment Notwithstanding the Verdict.

Filed in the U. S. District Court for the Eastern District of Washington, October 4, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [22]

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. *E.* WOOD,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Opinion.

W. H. PLUMMER, for Plaintiff.
CANNON, FERRIS & SWAN, for Defendant.

RUDKIN, District Judge.—This action has been twice tried. On the first trial the Court directed a nonsuit at the close of the plaintiff's testimony on the ground that the only negligence shown was that of a fellow-servant of the plaintiff. The action was recommenced, and at the second trial the testimony did not differ materially from that offered at the former trial, but in order to end the controversy the Court denied a motion for a nonsuit at the close of the plaintiff's testimony and a motion for a directed verdict at the close of all the testimony, and submitted the case to the jury, believing at the time that it might later direct a judgment for the defendant, notwithstanding the verdict, in conformity with the local practice, if it concluded that there was no substantial testimony to sustain the verdict. Since the trial the Supreme Court of the United States has decided that a Federal Court may not grant such a motion, but the parties here have stipulated that if the Court is of opinion that there is no testimony to support the verdict, an order of dismissal shall be entered in lieu of an order [23] granting a new trial, and it is believed that this stipulation amounts to a waiver of the constitutional right to have the question of fact submitted to another jury and empowers the Court to do what it could not otherwise accomplish. There is no conflict in the testimony and the material facts are as follows:

The defendant owns and operates a sawmill plant at the town of Potlatch in the State of Idaho. A conveyer leads from the mill to a burner situate about one hundred and twenty-five feet distant from the mill in which waste and refuse matter is carried from the mill to the burner and consumed. This conveyer leaves the mill about four feet above the ground and enters or connects with the burner at a height of forty-five or fifty feet from the ground. The conveyer has a railing and footwalk on either side, is about eight or ten feet in width, and is supported by wooden bents sixteen feet apart. At the time the plaintiff received the injuries complained of, the mill was closed down for repairs. About three days before the accident three workmen were directed by the superintendent or millwright to make certain repairs on a sprocket-wheel at the end of the conveyer next to the burner. To accomplish this work it became necessary to erect a scaffold, and for that purpose a number of timbers, estimated by one of the witnesses at from six to ten, were carried up from the mill over the conveyer to the burner. After the repairs on the sprocket-wheel were completed these timbers were taken down and carried back down the conveyer to a point about twenty-five feet from the burner and perhaps thirty feet above the ground. During this same period of three days the plaintiff and another crew of workmen were engaged in making certain repairs within the burner, the plaintiff mixing the mortar which was used for that [24] purpose on the outside of the burner. On the morning of the accident the plaintiff found it necessary to

go from his place of work to the boiler or engine-room in search of lime, and in so doing passed under the conveyer between two of the supporting bents at a point about twenty-five or thirty feet distant from the burner and directly beneath the scaffolding timbers above. On his return one of the men engaged in making the repairs on the sprocket-wheel threw one of the timbers which had been removed from the scaffold to the ground below, striking the plaintiff and caused severe and permanent injuries to his head. For the injuries thus received a recovery of damages is sought in this action. It may be further stated that one of the men making the repairs in the burner was in charge of the crew there employed, and one of the men engaged in making the repairs on the sprocket-wheel was in like charge. These two men are referred to in the testimony as straw bosses, and it was the man in charge above who threw the stick of timber that caused the injury.

On the foregoing facts the jury returned a verdict in favor of the plaintiff in the sum of five thousand dollars, and the sufficiency of the testimony to support a verdict in that or any other sum in favor of the plaintiff is the only question before the Court for consideration at this time.

Of course, it is an elementary rule of law that the master must provide a reasonably safe place for the servant and reasonably safe instrumentalities with which to perform his work, and must exercise reasonable care to maintain the working place and instrumentalities in a reasonably safe condition. It is likewise an elementary rule of the common law that the

master is not liable in damages for injuries inflicted upon a servant through the negligence of a fellow-servant, and this rule of the common law prevails [25] in the State of Idaho and is enforced by the Federal Courts in all its rigor. I utterly fail to see wherein the master has violated the first rule in this case or how the injured servant can escape the consequences of the second. The act of bringing up or taking down the few timbers used in the scaffold was a mere incident or detail of the work in which the servants were engaged, and the mode of doing this might well be left to the servants themselves, without direction or supervision on the part of the master, unless we are prepared to hold that the master must supervise and superintend every detail of the work and every act of his servant in the course of their employment. That the offending workman and the injured workman were fellow-servants in this case and that no liability on the part of the master exists it seems to me is fully established by the following authorities among scores of others that might be cited:

Central Rd. Company vs. Keegan, 160 U. S. 259.
Alaska Mining Co. vs. Whelan, 168 U. S. 86.
Hermann vs. Port Blakely Mill Co., 71 Fed. 853.
Donnelly vs. San Francisco Bridge Co. (Cal.), 49 Pac. 359.

The jury have found that the plaintiff was injured without fault on his part, and it may well be that the law should afford him compensation, but his rights are measured by the laws of the State of Idaho where he was employed and where he received his injuries,

and in the administration and enforcement of these laws this Court has no discretion.

Under the stipulation of the parties the judgment heretofore entered should be vacated and set aside and the action dismissed, and it is so ordered.

[Endorsements]: Opinion. Filed in the U. S. District Court for the Eastern District of Washington, October 6, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. **[26]**

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Order [Sustaining Motion for Judgment Notwithstanding the Verdict, etc.]

This cause coming on to be heard before the Court on defendant's motion for judgment notwithstanding the verdict of the jury, and the record and files in this cause, and after considering said motion:

It is hereby ORDERED: That said motion be, and the same is hereby sustained and the verdict of the jury and judgment entered thereon is hereby vacated and set aside, and defendant do have and recover judgment against plaintiff that this cause be dismissed and defendant recovers costs herein, to all

and each of which plaintiff excepts, and his exception is allowed.

It is further ORDERED: That plaintiff have thirty (30) days from the date hereof in which to serve and file his proposed bill of exceptions and statement of facts.

Done in open court this 11th day of October, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

O. K.—(Signed) E. J. CANNON.

[Endorsements]: Order and Judgment Granting Defendant's Motion for Judgment Notwithstanding the Verdict, and Order Extending Time of Plaintiff to Prepare His Proposed Bill of Exceptions. Filed in the U. S. District Court for the Eastern District of Washington, Oct. 11, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. **[27]**

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

M. C. WOOD,
Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Notice of Filing of Plaintiff's Proposed Bill of Exceptions.

To the Above-named Defendant, and to Cannon, Ferris & Swan, Attorneys:

The plaintiff in the above-entitled cause herewith delivers and serves upon you his proposed Bill of Exceptions which he will deliver to the Clerk of the above-entitled court, as provided by law, for the purpose of having the same delivered to the Hon. Frank H. Rudkin, Judge of the above-entitled court and the Judge who tried said cause, for the purpose of, in due time, having the same certified as the correct Bill of Exceptions taken, made and had in said cause and to be made a part of the record herein, the same to be used by plaintiff upon Writ of Error to the Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff.

Service of the within notice and Said Proposed Bill of Exceptions is hereby admitted this 16th day of October, 1913.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant. **[28]**

[Endorsements]: Notice of Filing Bill of Exceptions. Filed in the U. S. District Court for the Eastern District of Washington, October 16, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. **[29]**

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that on the 16th day of April, 1913, the above-entitled cause came on for trial before the above Court and a jury duly impanelled, the Hon. Frank H. Rudkin presiding, plaintiff appearing by his attorney, W. H. Plummer, and the defendant appearing by its attorneys, Cannon, Ferris & Swan, the following proceedings were had. Mr. Plummer made his opening statement to the jury, the opening statement of the defendant being reserved, whereupon the following evidence was adduced on the part of the plaintiff.

[Testimony of Alexis E. Albert, for Plaintiff.]

Testimony of ALEXIS E. ALBERT, a witness called on behalf of plaintiff, after being duly sworn, testified as follows:

Direct Examination.

My name is Alexis E. Albert. In September, 1911, at the time of the happening of the injury to the plaintiff [30] complained of in this cause, I was working for the Potlatch Lumber Company, the de-

(Testimony of Alexis E. Albert.)

fendant herein, at Potlatch, Idaho. The company owned and operated a large sawmilling plant and for that purpose owned and operated a structure and appliance known as a conveyer. In describing the conveyer and structure I will say that the conveyer is used for the purpose of conveying refuse material from the sawmill proper out of and away from said mill and placed in a receptacle built of brick and mortar called a burner, where said refuse material is burned up. Said conveyer is about 125 feet in length and at the mill end of it it is about 4 feet above the ground and extends outward and upward in an incline floor up to the burner, at which point it is about 45 feet in height from the ground. This conveyer is composed of an endless chain apparatus which runs over a sprocket upon the burner end thereof, something upon the principle of the old style straw-stacker of a threshing machine, the endless chain running in a sort of trough and by the chain being operated over and around both ends of said conveyer the refuse material is transported outward and upward and dumped over into the burner where it is destroyed. Alongside of this conveyer an incline upward about the same grade as the conveyer itself is a structure or platform which is somewhat wider than the conveyer itself and extends the full length thereof, so that workmen can work on either side of said conveyer and have a walkway for that purpose, the whole structure being about 10 feet in width. The structure is erected upon timbers or bents, or what might be termed trestles; that is, the

(Testimony of Alexis E. Albert.)

same is supported in this incline position along said conveyer by framework of **[31]** timbers built at different intervals along the ground under and supporting the structure and conveyer. The defendant worked in the operation of its milling plant over 500 or 600 or 800 men. (Here the witness describes on a blackboard by using chalk the general situation of the conveyer, burner and immediate vicinity.) In showing incline or decline or whatever it is, I will say that this is called the burner here and this is the incline. I will mark the burner "B" and the incline "I" and "M" for the mill. This structure is supported by posts, and these posts come down to the level of the ground. At the burner the floor of the structure supporting the conveyer is between 35 and 40 feet from the ground. I saw the accident. At the point under the structure near where the plaintiff was hurt it was about 25 or 30 feet from the burner at the place where I make a cross on the board. I was working on the top of the conveyer when the accident occurred. There was working with me Mr. Robert Fennell and another man we called "Shorty." Mr. Hibbard sent all of us men to work up there. He, Hibbard, was the head millwright; he did not have personal charge of the work there; Mr. Fennell had personal charge of the work being done by "Shorty" and me upon the conveyer. Just before the accident happened I was working upon the conveyer up above where Mr. Wood was injured. There was a brick on either side of the conveyer and I was standing on these working at the time of the accident. The whole conveyer was about 10 feet wide; the dis-

(Testimony of Alexis E. Albert.)

tance from where Fennell stood on the conveyer down to the ground was about 30 or 35 feet. This space underneath the conveyer, that is this space between the supports or bents was used generally for teams to drive through and for people to pass through in doing the work [32] in and about the milling plant. The place was used generally as a regular thoroughfare for the men to go back and forth to their work; the same had been used as described all the time I worked there. Just immediately before the accident happened we had fixed a sprocket-wheel that we were working on. The sprocket-wheel was situated at the end of the conveyer right near the burner. We had hauled some timbers up to build a scaffold. These timbers were taken from the ground down below and conveyed by the conveyer up to the burner, where we took them off and built a scaffold so as to be up high enough to put in a new sheave-wheel, and just before the accident happened we had completed this work and was tearing the scaffold down, and under instructions from Mr. Fennell I was taking the scaffold apart, and the different timbers and lumber was put in the conveyer, where it was conveyed down to the point on the conveyer up over the place where Mr. Wood was injured. The distance we took the lumber down where the scaffold had been built was about 25 or 35 feet. There were six or ten large pieces of timber that we placed on the conveyer platform under orders of Fennell, from which point they were afterwards thrown down upon the ground. I had not thrown any pieces down on

(Testimony of Alexis E. Albert.)

the ground myself, but Fennell and the other man had thrown down about six or eight pieces. The piece that struck Mr. Wood was about eight feet long and six inches by eight inches in thickness and width. The pieces that were thrown down upon the ground before the one was thrown that hurt Mr. Wood were thrown down about five minutes before Mr. Wood got hurt; that is, before the one which hurt Mr. Wood was thrown down. I did not see the timber strike but afterwards I saw **[33]** Mr. Wood lying on the ground on his face; his head was bleeding. I did not go down there at all; kept right on working as others had gone down there to help Mr. Wood. There was no reason why the timbers could not have been continued down upon the conveyer to the ground the same as they had been brought up, and the timbers were being thrown over the side by the orders of Mr. Fennell who was in charge of the work. Fennell himself threw down the one that struck Mr. Wood. There was no one stationed down on the ground to warn anyone of the throwing down of said timbers and no barrier or other warnings were placed in front of or near the place where it was customary for men and teams to walk in going to and performing their work. No warning of any kind was posted or given except when the men would throw down a piece of wood they would sometimes holler. I think I heard one man holler once, but I don't know which one it was. I didn't see Mr. Wood when he passed underneath the structure and did not see him until he was hurt. The kind of work we were doing,

(Testimony of Alexis E. Albert.)

as I said before, before this accident, and for which we used the scaffolding, was the taking out of an old sprocket-wheel and putting in a new sheave-wheel. These were repairs being made by us to the conveyer. The endless chain would run over the sprocket-wheel which was situated at the end of the conveyer right close to the burner; the sprocket-wheel is a wheel with teeth and an endless chain goes right over that, and the turning of the sprocket-wheel makes the chain move and convey the materials to the burner.

Cross-examination by Mr. CANNON. [34]

Mr. Fennell was boss over me and these other men that were working there; that is, over me and another man, while we were working up there on the conveyer. His boss was Mr. Hibbard, who was the general millwright in charge; his boss was the Superintendent of the company; Mr. Seymour; Mr. Seymour's boss was Mr. Laird. Mr. Laird would give his instructions to the superintendent, the superintendent would give the instructions to the foreman, and the foreman would give instructions to the men working under him, and while I was up there working with the other men Mr. Fennell told us two men what to do. The conveyer was about four feet from the ground when it started from the mill and it inclines up higher as it goes out to the burner until it gets to be 45 or 50 feet high. The conveyer is for the purpose of taking away the waste from the mill and burning it up. The burner is about 30 or 35 feet in diameter. I don't know all of the things that the

(Testimony of Alexis E. Albert.)

men would have to pass under this conveyer structure for, but they would pass under it from time to time in going about their work, and specially when the whistle would blow the men would all come out of the mill and go through underneath the conveyer this way because it was the shortest. There was no board walk to walk on through there; the whole structure underneath was open. We were repairing the conveyer at the burner end of it. We worked on this job about three days. I knew Mr. Wood as I had worked with him before. He was working under a boss by the name of Mr. Nelson. He and Nelson were working for some days doing mason work, repairing the burner itself, using lime, brick and like materials. He, Wood, had nothing to do with the work we were doing. We took our directions from [35] Fennell. Mr. Wood was helping Mr. Nelson and his crew in building a brick foundation for the burner. He had been working down below on the ground going back and forth and doing general work helping fix the burner for two or three days. I saw him occasionally from time to time during the three days I worked upon the conveyer and if he had looked up he could have seen me. There was obstructions between the drum and the mill underneath the conveyer to prevent him from going around by the drum; the obstructions consisted of old grates that came out of the burner and also some bricks that had been hauled out there in wheelbarrows. Pieces had been thrown down before the one was thrown down which hit Mr. Wood; quite a number of them. I do not know exactly but five or six.

(Testimony of Alexis E. Albert.)

Q. Did you hear anybody yell when they were being thrown down? A. Yes, sir.

Q. What would they yell, "Look out," or what?

A. "Look out below."

Q. Who would call it—was it the fellow that would throw them out, or the other fellow below—the fellow that was up above would holler out "Look out below"?

A. Yes, sir, that is the man. I was engaged in my own work and not throwing any down myself, and I didn't pay much attention to that excepting I heard them holler; I don't know that I heard them holler more than once or not. ~~Those timbers were being thrown down by orders of Mr. Fennell, the foreman.~~

Redirect Examination by Mr. PLUMMER. [36]

We were working up close to the burner a short time before the accident and when we got through there we were supposed to take our lumber and throw it down on the ground. This was Fennell's orders. We were not working three days right above and over the place where Wood was hurt but were working up near the burner a distance of 25 or 30 feet from where the timbers were afterwards thrown down on the ground. Fennell and "Shorty" were only at the place on the conveyer above and over which Wood was walking at the time of his injury just a few minutes before he was hurt. In fixing this sprocket-wheel the sprocket-wheel was up near the burner and we worked there three days until we got through working on this scaffold and then we tore the scaffold down and brought the lumber down to the place where it was afterwards thrown over the other side down

(Testimony of Alexis E. Albert.)

upon the ground. I had been working for the Potlatch Lumber Company about eight months around this mill before this accident occurred. The gates and piles of brick that I spoke of were obstructing the other means of going under the conveyor. In going from place to place about said mill were large grates about four or six feet long and about eighteen inches wide at one end and twelve at the other. I do not know how many were piled up but a good many. They made too big a pile for any body to walk over. The bricks were a number of wheelbarrow loads but I do not know just how many. The bricks and old grates had been there two or three days.

[Testimony of R. C. Finnell, for Plaintiff.]

R. C. FINNELL, being sworn on behalf of plaintiff, testified as follows:

Direct Examination by Mr. PLUMMER. **[37]**

On September 21st, 1911, when Mr. Wood was hurt I was employed and working for the Potlatch Lumber Company at Potlatch, Idaho. I was the boss in the immediate charge of the men fixing the sprocket-wheel at the end of the conveyer. Mr. Charlie Hibbard, the foreman of the mill, sent me up there and told me to take charge of these men and do this work. He, Charlie Hibbard, the mill foreman, had charge of everything around there. Hibbard told me to go up to the top of the burner and remove a sprocket-wheel in the end of the conveyer and put in a sheave in its place. Hibbard did not give me any other instructions. In order to do this work it was necessary to take some lumber up there from the yard to the top

(Testimony of R. C. Finnell.)

of the conveyer and there build a scaffold and afterwards to replace the lumber down on the ground. This was all left for me to do and to have charge of.

Cross-examination by Mr. CANNON.

I am employed now at La Grande, Oregon, with the Palmer Lumber Company. I am not now in the employ of the Potlatch Lumber Company. It has been nine months since I was in the employ of the Potlatch Lumber Company. Mr. Hibbard was my boss and I went up there to repair the conveyer. This conveyer, I should judge, was about 120 to 130 feet in length. That is, from the mill to the burner. I had been working for the Potlatch Lumber Company about three years before this accident, and we had been working on the conveyer up there near the burner for about three days before the accident. The conveyer where it came in contact with the burner was about between 40 and 50 feet from the ground. The [38] conveyer is supported by trestles which are ten by ten from the ground; that is, ten inches by ten inches. We sometimes called them bents. These bents were sixteen feet apart. I had two men under me at the time. I said that Hibbard was my immediate superior. Nelson was not my foreman or over me in any way. Hibbard was Nelson's superior; Nelson himself was one of the bosses. I knew a man there by the name of Mr. Seymour; he was the superintendent over Mr. Hibbard.

Witness excused.

[Testimony of M. C. Wood, in His Own Behalf.]

M. C. WOOD, plaintiff, called on his own behalf after being sworn testified as follows:

Direct Examination.

I am the plaintiff in this case. On the 21st day of September, 1911, I was working for the Potlatch Lumber Company. Had been working for that company about three years. I first worked at Boville in the woods and then afterwards at Palouse at the mill there and then at Potlatch. I had been working at Potlatch around the mill about two years and a half before my injury. Some time previous to my injury I had been working around the mill sweeping and cleaning up and on Sundays I would look after the burner and help clean it out and of course regulate the drafts during the week, keeping the drafts regulated and attending to the burner generally. I was getting $2.50 a day. On September 21st, 1911, I was injured. I feel the result of the injury ever since. I do not remember of getting hit as I was knocked unconscious and remained unconscious for [39] a number of days. On the day I was hurt I was working in and about the burner repairing it, mixing mortar and helping the brick mason. Just before I was hit I had been mixing mortar and I discovered there was no lime and in the performance of my duty I went to the boiler-room to get some so as to mix in the mortar. In describing where the boiler-room is with reference to where I had to use the lime I will say, now the engine-room and boiler-room runs along this way (illustrating). I was mix-

(Testimony of M. C. Wood.)

ing mortar over near the burner on one side of the conveyer and the boiler-room is on the opposite side of the conveyer, necessitating my going under the conveyer in order to get to the boiler-room. I make two X's on the board showing the boiler-room. As I passed under this conveyer and went under the post here and went to the boiler-room to get some lime and after leaving the boiler-room I started back to where I started, passing under the conveyer structure, and that is the last I remember. The last I remember I was walking along the pathway, just leaving the boiler-room going back. The next I remember is when I came to myself in the hospital nine days afterwards. This pathway or space under the conveyer was used as a regular pathway for teams and men in going from one part of the mill grounds to the other. This pathway which was used for teams and men is the one that I travelled over both going to the boiler-room and coming back when I got hit. I will show on the blackboard here where these particular places were in the structure, these particular paths I speak of using for teams. The cross which indicates the place where I got hit is right on the outside from under the conveyer along the same pathway. I will mark the pathway "O". The place where Mr. Albert marked the cross at the place where I got hit. This path was used in addition to teams going [40] back and forth, for people in passing in and about in the performance of their work. As near as I can estimate I would say that fifty people would pass along this path under this structure daily, the same place where I was walking when I got hit.

(Testimony of M. C. Wood.)

Some days there are more than others, that depends on the work. On one side was the boiler-room and engine-room and other buildings, and on the other side was where I was making mortar. This path extends along there and leads to a walkway which leads to the mill. I first came from the mortar-box under the conveyer structure to the boiler-room and then started back over the same path and continued until I got hit. I have passed under this same conveyer structure in the performance of my work at numerous times before the day I was hit. I didn't know there were any men working upon the conveyer structure up there over this pathway; I did know they were working over near the burner fixing the sprocket-wheel which is about 30 or 40 feet closer to the burner than the place where I got hit. I didn't at any time see any men working right over where I was walking. I never heard any warning of any kind given by any body. My hearing was good and I could have heard if any warning had been given sufficient for an ordinary person to hear where I was. Nobody gave me any warning that they were going to throw down any boards or planks of any kind that I heard. I was not making any noise myself. There was nothing to prevent me from hearing if there had been a warning given loud enough for a person to hear. There were no barriers or notices of any kind put up there to warn any body of any danger or prevent them from walking into danger, and there was nothing around there to indicate that it was a dangerous place for me to go.

(Testimony of M. C. Wood.)

Cross-examination by Mr. CANNON. [41]

I had been working for that company for about three years. I was working around looking after that burner and sweeping and cleaning up; that is, looking after the burner when the mill was running. I was not a roustabout. I just looked after the burner. I was not a sort of ready man and did things that I found necessary to do, but in regard to cleaning out the burner I tended to that as I was used to that work there. I was the oldest man on that part of the work and knew most about it. I was familiar with the burner there and familiar with the conveyer; perhaps as familiar as any body else around the mill.

Q. And you knew the conditions all around there, didn't you?

A. Well, I knowed part of them, I don't say that I knowed all. I knew something about the length of the conveyer. I don't know positive just the length of it. It might have been about 100 feet or something like that and at the burner about 45 or 50 feet high, and the place where I was hurt about 35 or 40 feet, then it run down slanting like to the mill where it run pretty close to the ground. The conveyer structure must have been about 8 or 10 feet wide, I am not positive. The nearest bent that supported the conveyer was about 30 or 40 feet from the boiler-room. The conveyer structure was right in front of me as I went out of the boiler-room and I could look up and see it. I had to walk about 30 feet before I got to it. These men had been working up at the end of the conveyer near the burner about three days. I saw them from time to time working up there at the

(Testimony of M. C. Wood.)

sprocket at the end of the chain. On [42] the day I was hurt I don't remember whether I looked up to see whether they were there yet or not. I didn't pay any attention to them. I should say there were 6 or 7 bents between the ends of the conveyer and the mill and a team could drive between any of them, I guess, I don't know. Teams would go under these places between these bents in performing general work around the mill there, especially the roustabout team. It was his general pathway around there cleaning up around the burner. When I say it was used customarily and regularly for teams I mean the teams would pass under there in going about the mill grounds, it being a regular roadway for that purpose, and for taking up waste and stuff throwed away, and it was handy for him, ~~other~~ ~~teams~~ to pass through there. The work the teams would have to do around the mill would be hauling supplies in and out and passing in and out to haul stuff from one place to another where it belonged, which included grates, brick and lime, and one thing and another that they needed in fixing the burner. I didn't mean that teams would drive along through these places as they would drive on Riverside Avenue, but once in a while a team would go through there and men would also go through there in going about their work. They went through quite often. There was quite a few men working there. I could not tell how many. Before the time of my injury during the time that I had been working at the mill I often worked with Mr. Finnell in and about the mill. During that work he was over me; that is, he was my boss. I was not in

(Testimony of M. C. Wood.)

his crew the day of the injury, but before that time in working around the mill Finnell was my boss when the ~~general~~ foreman was away. I done what Mr. Finnell gave orders [43] to do. The day I was hurt I did not stay in the boiler-room but two or three minutes. I was one of the oldest men working around there tending to the burner and had been doing other work before that time. This conveyer was for the purpose of carrying stuff up to where it would be burned. It had a solid floor so that nothing would drop down through the conveyer structure. There was a walkway on each side of it and a floor underneath and the same was operated so that the conveyer would carry stuff up to the burner, a good deal like some of those old style threshing machines carrying grain up to the stack. This conveyer carried stuff to the burner from the mill, that is, waste and rubbish, pieces of wood and the like.

Redirect Examination by Mr. PLUMMER.

Q. Was there anything there that you know of to prevent these timbers and planks being carried down to the ground from the point where they had been used as a scaffold by means of the conveyer the same way they were carried up?

A. There was not. They could have carried them down on that incline, that is the conveyer, the same as they were carried up.

There was a walkway up and down each side. The timbers were all carried up by the conveyer and they could have been carried down just the same.

When I woke up in the hospital I was suffering intense pain in my head and I have been unable to do

(Testimony of M. C. Wood.)

any work since the time of my injury. There is a terrible pain in my [44] head all the time and frequently I get awful dizzy and weak. I have lost fully twenty pounds of flesh and am unable to do anything requiring physical exertion. My head was cut and the inside of my skull injured in some way. I am forty-two years old.

[Testimony of R. C. Finnell (Recalled).]

R. C. FINNELL, being recalled as a witness on behalf of plaintiff, testified as follows:

(By Mr. PLUMMER.)

It was only a few seconds after Mr. Wood was hit until I got to him. He had been picked up before I could get to him. I saw his head had been mashed and blood on his head here. (Indicating.) I don't know exactly where he was standing when he was struck but when he had fallen and was lying on the ground he was about twenty-four feet from the conveyer or something like that. He appeared to be lying after he was struck about twenty or twenty-four feet this side of the conveyer. That is, on the side of the conveyer furtherest away from the boiler-room. I threw the stick down that must have struck him. I never saw him there at all until after he was hit. There was nothing to prevent me from replacing these timbers on the ground down below by using the conveyer or by letting the same down with ropes, or by throwing the same down at some other point. The pieces were being thrown down by my orders, but I did not know there was any body down there who

(Testimony of R. C. Finnell.)

would be liable to be hit. Mr. Wood was unconscious when we arrived to where he was.

Witness excused. [45]

[Testimony of Dr. D. L. Smith, for Plaintiff.]

Dr. D. L. SMITH, witness on behalf of plaintiff, after being sworn, testified as follows:

I am a regular physician and surgeon practicing medicine and surgery in the city of Spokane, and have been for a number of years, duly licensed for that purpose. I have treated Mr. Wood, the plaintiff in this case, on numerous occasions and made numerous examinations of his injuries and his physical condition. The injury he sustained caused a fracture of the skull and an injury to the inner membrane or inner table of the skull, and there seems to be a part of the skull pressing down upon the brain. A surgical operation might relieve the situation partly, but such an operation is very dangerous and might cause his death. I do not think I could advise an operation on that account under the circumstances. He is unable to do anything requiring physical exertion. He cannot work and he is constantly suffering pain in his head, all of which condition is permanent.

Witness excused.

Mr. PLUMMER.—Plaintiff rests.

Mr. CANNON.—If the Court please, the defendant now moves the Court to instruct the jury to render a verdict for the defendant and challenges the sufficiency of the evidence to justify any verdict for plaintiff on the grounds.

1. That plaintiff assumed the risk of the injury

which he received. [46]

2. That the negligence, if any, which caused his injury, if any, was the negligence of a fellow-servant of plaintiff, and that his injury was not caused by anyone or anything for which the defendant in this case was responsible or liable.

After argument by counsel for plaintiff and defendant the Court denied the motion, to each and all of which defendant excepted and exception was allowed.

Defendant rests.

Thereafter Mr. Plummer, for plaintiff, and Mr. Cannon, for defendant, argued the case to the jury and thereafter the Court gave the following instructions to the jury:

[Instructions of the Court to the Jury.]

The COURT.—Gentlemen of the jury: There is little or no conflict in the testimony in this case, and if you hear and follow the instructions of the Court I apprehend you will not experience much difficulty in reaching a verdict.

This is an action to recover damages for personal injury and the action is based upon negligence on the part of the defendant. Negligence is defined in law as the doing of that which a reasonably careful and prudent man would not have done under the like circumstances and conditions, or not to do that which a reasonably careful and prudent man would have done under the like circumstances and conditions.

It is the duty of the master to exercise reasonable care, to furnish a reasonably safe place for his ser-

vants and to exercise reasonable care to see that that working place is [47] kept reasonably safe. When the master has done this, he has performed his full duty. He does not guarantee the safety of his servant, and if the servant is injured through the negligence of a fellow-servant or otherwise after the master has exercised that degree of care which the law imputes upon him, the servant must suffer his misfortune in silence.

I further instruct you, gentlemen of the jury, that under the law the master is not liable to one servant for injury received from the negligence of a fellow-servant. In order that you may understand this, suppose a farmer sends two men out in a field to work and one of these men negligently injures the other, the master is not responsible. So, if a contractor puts a crew of men to work on a building and some of these men are working up on a scaffold overhead and some of them are working underneath and one of the men on the scaffold negligently throws a stick of timber down upon one underneath, the master is not liable. These are the ordinary risks incident to the employment which the servant assumes.

The only theory upon which there can be a recovery in this case is that the defendant failed to furnish a reasonably safe place for these persons to work and failed to exercise reasonable care to see that the place was kept safe.

Place yourself in the position of this defendant; suppose you sent three men to repair this burner and sent three men above to repair this sprocket-wheel, would you consider that a reasonably safe place for these men to work, under the circumstances; would

you, as reasonable men, anticipate that one of these men would throw a stick of timber out of this carrier negligently and injure a person below? [48]

The question whether this place was reasonably safe is practically the only question for you to consider; if you, as reasonable men, would have pursued the same course that the defendant did in this case in the exercise of reasonable diligence, then the master is not liable.

If you, in the exercise of reasonable care, would have taken precaution which the master here did not take for the protection of these workmen, then the master is liable to the plaintiff if such failure to exercise care was the direct and proximate cause of the injury.

If you find for the plaintiff in this case, that is by a preponderance of the testimony, it will be incumbent upon you to fix the amount of his recovery. You have heard the testimony bearing upon the nature and extent of his injuries. You will fully compensate him for any pain or suffering he has endured in the past by reason of this injury, and for any pain and suffering he will endure in the future. You will compensate him for any impairment of his earning capacity in the past, resulting from this injury; and for the loss which he will sustain by reason of the impairment to his earning capacity in the future. These things, gentlemen of the jury, will make up your verdict.

The fact that this defendant is a corporation has no bearing, directly or indirectly, upon this case. Its property is as sacred as yours. If it has wronged this plaintiff and has failed to protect him under the

law as it should have protected him, it is liable in damages. If it has exercised that degree of care which the law imputes upon it, it is not liable in damage. It matters not to you [49] whether you approve the fellow-servant doctrine or not. It is the law of the State of Idaho; it is the law which you and I are sworn to support and administer, and it is your duty to accept the instructions of the Court in that regard.

These are all the instructions I deem it necessary to give you, but I will further instruct you that if the person who threw this stick of timber down upon this man, if he did it without warning, was guilty of gross and criminal negligence. I say for that negligence the master is not liable; but if you find that the accident happened through the careless negligence of the master and the fellow-servant, then the master is liable. That is, if he was injured through the failure of the master to furnish a reasonably safe working place, coupled with the act of a fellow-servant in throwing the stick of timber upon him.

I further instruct you that if the master knew that persons were passing to and fro under this place, it was bound to anticipate that the plaintiff might be there or know that some other person might be there. Of course, if it had no reason to anticipate, then it was bound to take no precaution against it.

I have prepared two forms of verdict, one a verdict for the plaintiff and one a verdict for the defendant. In event you find for the defendant, you will simply sign the form so finding; if you find for the plaintiff, you will insert in the blank left in the verdict the amount for which you so find.

I have stated to you that the burden of proof is upon the plaintiff to establish his case by a preponderance [50] of the testimony, that is, the greater weight of the testimony. He must further establish that the defendant was negligent by a preponderance of the testimony, and he must next establish the amount of his damages by a preponderance of the testimony.

You, gentlemen of the jury, are the sole judges of the facts in this case and the credibility of the witnesses.

In arriving at your verdict you will consider all of the testimony and reach such conclusion as the facts will warrant. You may retire, gentlemen of the jury.

Whereupon the jury retired to consider their verdict, and after due deliberation returned into court with their verdict awarding damages to plaintiff in the sum of Five Thousand Dollars ($5,000.00) against defendant. Whereupon judgment was entered on said verdict in favor of plaintiff and against defendant for the sum of Five Thousand Dollars ($5,000.00).

Thereafter and within the time allowed by law defendant moved the Court for judgment *non obstante veredicto* and in event said motion was denied; defendant moved the Court to set aside the verdict and grant a new trial. Said motions came on regularly for hearing by virtue of stipulation of the parties heretofore filed in this cause, both parties being present, and the same were argued by counsel for the [51] respective parties; whereupon the Court granted defendant's motion for judgment *non ob-*

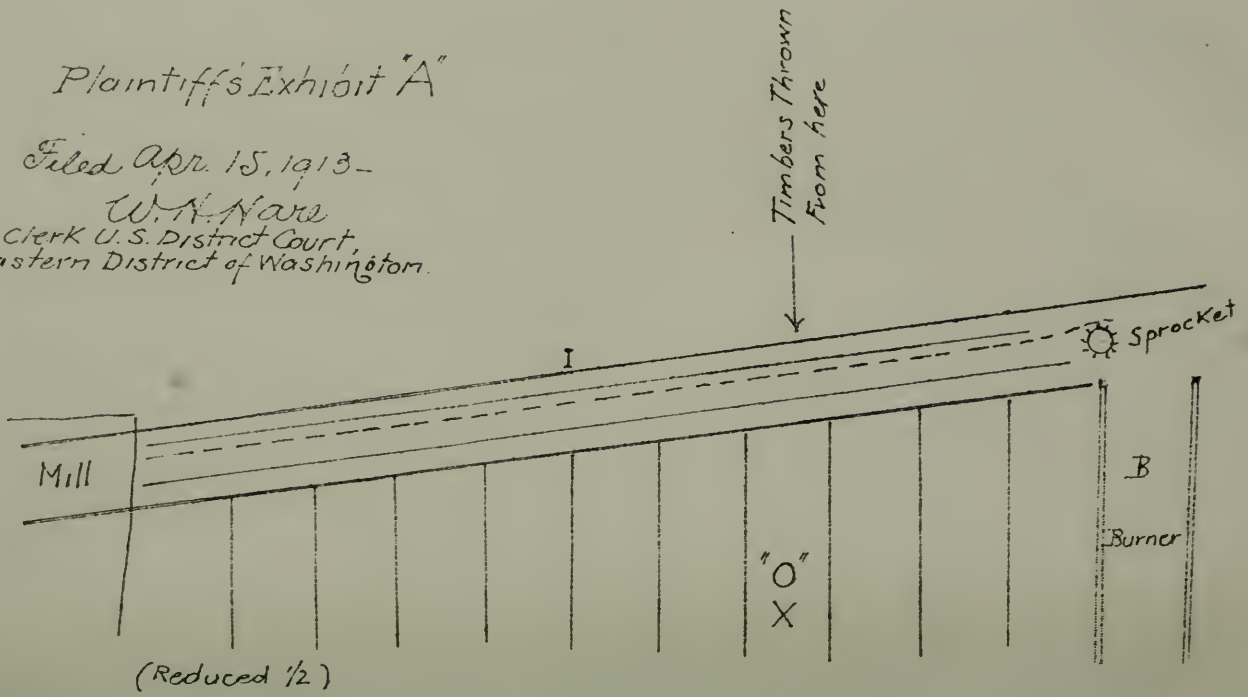
stante veredicto, to which ruling plaintiff then and there excepted and his exception was allowed, and now, in the furtherance of justice and that right may be done, the plaintiff presents the foregoing as his Bill of Exceptions in this cause, and prays that the same may be settled and allowed and signed and certified by the Judge as provided by law and the practice of this Honorable Court.

Plaintiff's Exhibit "A," hereto attached, is permitted by the Court to be sustituted for the plat made by the witnesses on the court blackboard.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff. [52]

Plaintiff's Exhibit "A"

Filed Apr. 15, 1913.
W. N. Nave
Clerk U. S. District Court
Eastern District of Washington.



(Reduced ½)

In The District Court of the United States, for the Eastern District of Washington, Northern Division.

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Certificate and Order Allowing and Settling Bill of Exceptions.

This cause coming on duly and regularly for hearing before this Court on this date upon application of the plaintiff for the settling and certifying of his proposed Bill of Exceptions lately filed herein, and the said proposed Bill of Exceptions having been presented, served and filed within the time allowed by the Court, and the Court considering said proposed Bill of Exceptions and being fully advised therein, it is now

ORDERED: That the foregoing Bill of Exceptions be, and the same is hereby approved, allowed and settled as the true, full and correct Bill of Exceptions in said cause, containing in narrative form all of the evidence and proceedings taken and had upon the trial of said cause and all the exhibits, and that the same as so settled and allowed be now and here certified accordingly by the undersigned, Judge of this court, who presided at the trial of this cause, and that the Bill of Exceptions when so certified be filed herein by the clerk. [54]

I hereby certify that the foregoing Bill of Exceptions is fully true and correct in all respects, and is hereby approved, allowed and settled and made a part of the record herein.

Done in open court this 25th day of October, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Bill of Exceptions. Filed Oct. 25, 1913. W. H. Hare, Clerk. By F. C. Nash, Deputy. **[55]**

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. C. WOOD,
Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Assignment of Errors.

Come now the above-named plaintiff, M. C. Wood, and makes and files the following Assignments of Error in said cause, which said plaintiff will rely upon in the United States Circuit Court of Appeals for the Ninth Judicial Circuit for relief from and reversal of the judgment entered in this cause in the court below, to wit:

I.

That the Court erred in sustaining defendant's motion to set aside the verdict heretofore rendered by the jury in said cause in favor of the plaintiff and against defendant, and in vacating and setting aside

the judgment rendered by the Court upon said verdict and granting judgment to defendant notwithstanding the verdict.

II.

That the Court erred in adjudging and ruling that the injury to plaintiff was caused by the negligence of a fellow-servant of plaintiff.

III.

That the Court erred in holding and deciding that defendant is not liable in any manner whatsoever to plaintiff for the injury received by him alleged and pleaded in plaintiff's complaint. [56]

IV.

That the Court erred in holding and deciding that there was no negligence suffered or committed by anyone for which and for whom the defendant was responsible or liable.

V.

The Court erred in vacating and setting aside the judgment in this cause in favor of plaintiff and dismissing the same.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff.

[Endorsements]: Service admitted this 11th day of October, 1913.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

Assignments of Error. Filed in the U. S. District Court for the Eastern District of Washington. October 11, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [57]

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit:

Comes now the above-named plaintiff, by his attorney, and complains that in the record and proceedings had in said cause and also in the rendition of the judgment in the above-entitled cause in said District Court of the United States, for the Eastern District of Washington, Northern Division, at the September term thereof, 1913, manifest error hath happened to the great damage of this plaintiff.

Your petitioner further respectfully shows that he has this day filed herewith his Assignments of Error committed by the court below in said cause and intended to be urged by your petitioner and plaintiff in error in the prosecution of this, his suit in error.

WHEREFORE, said plaintiff prays for the allowance of a writ of error to the said District Court, and for an order fixing the amount of bond, and for such other orders and process as may cause the same to be corrected by the United States Circuit Court of

Appeals for the Ninth Judicial Circuit.

Dated this 11th day of October, 1913.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff. [58]

[Endorsements]: Service admitted this 11th day of October, 1913. Further notice of application waived.

(Signed) CANNON, FERRIS & SWAN,
Attorneys for Defendant.

Filed in the U. S. District Court for the Eastern District of Washington, October 11, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [59]

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

M. C. Wood, plaintiff, in the above-entitled cause, having this day filed his petition for a writ of error from the decision and judgment made and rendered herein, to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an assignment of error within due time, and also praying that an order be made fixing the amount of

security which the defendant shall give and furnish upon said writ of error.

Now, therefore, it is ORDERED, that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and hereby is, fixed at Two Hundred and Fifty Dollars ($250.00).

Dated this 11th day of October 1911.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Allowing Writ of Error and Fixing Amount of Bond on Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, October 11, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. **[60]**

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

M. C. WOOD,
Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division, Greeting:

Because, in the Record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between M. C. Wood, plaintiff in error and the Potlatch Lumber Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said M. C. Wood, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit **[61]** Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 17th day of November next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 11th day of October, in the year of our Lord one thousand nine hundred and thirteen.

[Seal] W. H. HARE,
Clerk of the United States District Court, Eastern District of Washington, Northern Division.
By Frank C. Nash,
Deputy Clerk.

Allowed by:

FRANK H. RUDKIN,
District Judge. **[62]**

[Endorsed]: In the District Court of the United States for and Within the Eastern District of Washington, Northern Division. M. C. Wood, Plaintiff, vs. The Potlatch Lumber Company, a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Eastern District of Washington. Oct. 11, 1913. Wm. H. Hare, Clerk. Frank C. Nash, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, M. C. Wood, as principal, and The Title Guaranty & Surety Company, a corporation established under the laws of the commonwealth of Pennsylvania, and having its principal place of business in Scranton, in said commonwealth, as surety, are held and firmly bound unto the Potlatch Lumber Company, a corporation, in the full and just sum of Two Hundred and Fifty ($250.00) Dollars, to be paid to it, its successors and assigns, for the payment of which well and truly to be made we bind ourselves, and each of us and our and each of our assigns, successors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of October, 1913.

WHEREAS, lately, in the District Court of the United States for the Eastern District of Washington, Northern Division, in an action pending in said court between M. C. Wood, as plaintiff, and The Potlatch Lumber Company, a corporation, as defendant, a judgment of dismissal was rendered in favor of said defendant and against plaintiff, and costs of action, and the said plaintiff has obtained from said court a writ of error to reverse said judgment in the **[63]** aforesaid action and a citation directed to the above-named defendant, citing and admonishing them to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California;

Now, therefore, the condition of this obligation is such, that if the said M. C. Wood shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall remain in full force and effect.

Dated October 11th, 1913.

(Signed) M. C. WOOD,
By W. H. PLUMMER,
His Attorney.

(Signed) THE TITLE GUARANTY & SURETY COMPANY,
By F. W. DEWART,
Attorney-in-fact,
THOMAS MALONET,
Attorney-in-fact,

[Seal of Corporation Surety Company]

The above and foregoing bond approved this 11th day of October, 1913.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Bond on Writ of Error. Filed in the U. S. District Court for the Eastern District of Washington, October 14, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. **[64]**

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Citation.

United States of America,—ss.

The President of the United States to the Potlatch Lumber Company, a Corporation, and to Cannon, Ferris & Swan, Your Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, for the Eastern District of Washington, Northern Division, wherein M. C. Wood is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United

States, this 11th day of **[65]** October, 1913, and of the Independence of the United States the one hundred and thirty-fifth.

FRANK H. RUDKIN,
United States District Judge, Presiding in the District Court.

[Seal] Attest: W. H. HARE,
Clerk.
By Frank C. Nash,
Deputy.

Service admitted this 11th day of October, 1913.
CANNON, FERRIS & SWAN,
Attorneys for Defendant. **[66]**

[Endorsed]: In the District Court of the United States for and Within the Eastern District of Washington, Northern Division. M. C. Wood, Plaintiff, vs. The Potlatch Lumber Company, a Corporation, Defendant. Citation. Filed in the U. S. District Court, Eastern District of Washington. Oct. 11, 1913. Wm. H. Hare, Clerk. Frank C. Nash, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. C. WOOD,
Plaintiff,
vs.
THE POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error to be perfected to said court, and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Complaint;
Answer;
Reply;
Verdict;
Judgment on the Verdict;
Motion for Judgment *non obstante veredicto;*
Stipulation conceding power of Court to grant motion for judgment notwithstanding the verdict;
Opinion;
Judgment for defendant notwithstanding the verdict. [67]
Order Extending Time to File Bill of Exceptions;
Bill of Exceptions;
Notice of Filing Bill of Exceptions;
Assignment of Errors;
Petition for Writ of Erorr;
Order Allowing Writ of Error;
Bond on Writ of Error;
Writ of Error;
Citation;
Praecipe for Transcript of the Record;

and any and all records, entries, pleadings, proceedings, papers and filings necessary or proper to make a complete record upon said writ of error in said cause. Said transcript to be prepared as required by law and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff.

[Endorsements]: Praecipe for Transcript of the Record. Filed in the U. S. District Court for the Eastern District of Washington. Oct. 29, 1913. W. H. Hare, Clerk. By Frank C. Nash, Deputy. [68]

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1502.

M. C. WOOD,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing pages num-

bered from No. 1 to No. 68, inclusive, constitute and are a true, complete and correct copy of the record, pleadings, testimony and all proceedings had in said action as called for by the plaintiff and plaintiff in error in his praecipe for a transcript of the record herein, as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the annexed Writ of Error lodged and filed in my office on the 11th day of October, 1913. I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of $36.70, and that the same has been paid in full by W. H. Plummer, attorney for plaintiff and plaintiff in error. [69]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the City of Spokane in said Eastern District of Washington, Northern Division, in the Ninth Judicial Circuit, this 29th day of October, 1913, and the Independence of the United States of America, the One Hundred and Thirty-eighth.

[Seal] W. H. HARE,
Clerk, U. S. District Court for the Eastern District of Washington. [70]

[Endorsed]: No. 2337. United States Circuit Court of Appeals for the Ninth Circuit. M. C. Wood, Plaintiff in Error, vs. The Potlatch Lumber Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Received and filed November 3, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH JUDICIAL CIRCUIT.

M. C. WOOD,

Plaintiff in Error,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR AND WITHIN THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

STATEMENT OF CASE.

In the month of September, 1911, and for some time prior thereto, the defendant owned, operated and controlled a large saw milling plant at Potlatch, Idaho, employing from time to time from 500 to 800 men. As a part of their saw milling plant the com-

pany had constructed and was operating a structure extending from the sawmill proper out to a receptacle called a burner, said structure being herein designated as the conveyer. Said conveyer was erected upon bents or upright timbers and extended out from said sawmill a distance of about 125 feet in length, and inclined upward so that at the mill said structure was 4 feet above the ground and about 40 feet above the ground at the burner end thereof. This conveyer is composed of a structure about 10 feet wide built of lumber, and through the center of which is operated an endless chain apparatus which runs over a sprocket wheel at the burner end thereof, and was, as one of the witnesses described it, "built and operated upon the principle of the old style straw stacker of a threshing machine," the endless chain running in a sort of a trough and upon said conveyer along the center thereof, so that by the continuous operation of said conveyer and endless chain refuse material was transported from the sawmill up and out to the large receptacle and dumped therein and burned. Along on either side of the endless chain apparatus and on top of said conveyer was a sidewalk so that men could work upon said conveyer when necessary, on either side of said endless chain, and go up and down the conveyer by this means.

Some days prior to the happening of the accident to plaintiff, which is the subject matter of this controversy, defendant had directed one Finnell, one of the foremen of defendant, to take some men and erect a scaffold at the burner end of said conveyer

for the purpose of putting in a new shieve wheel. No special orders or directions were given to Finnell how to accomplish said job of replacing said shieve wheel, and his work, both in securing materials, doing the work and replacing materials, was left wholly to his judgment and direction. Under Finnell's orders and directions certain timbers and lumber for the purpose of erecting said scaffold so as to reach said shieve wheel was taken from the yard of the defendant and transported by means of the conveyer up to the ploint at the shieve wheel, and there said scaffold was constructed, said shieve wheel replaced, and under the orders and directions of said Finnell the men under him, for the purpose of replacing said lumber down in the yard from where it was obtained, instead of transporting said lumber down into the yard by means of the conveyer in the manner in which it had been transported up to where the scaffolding was built, said men and said Finnell transported said lumber and timbers down said conveyer a distance of between 30 and 40 feet from where the scaffold had been erected and torn down, and there, under the orders and directions of said Finnell, and for the purpose of getting said lumber down and back into the yards, threw said lumber and timbers over the side of said conveyer down upon the ground. Six or eight pieces of timber had been thrown upon the ground and the next piece, which was thrown over by the foreman himself, struck the plaintiff, injuring him very seriously.

At the time, and for some days prior to his injury,

plaintiff was employed and working for said defendant, assisting in mixing mortar and doing brick masonry work under a foreman by the name of Nelson, repairing the burner at a point down upon the ground, and was in no manner connected with, or associated with the work being performed under Finnell or by the men performing said work, or with Finnell himself. Wood's duties were designated, and his instructions were given him by the foreman Nelson, and was of a different class and kind of employment and in a different department of service than that being performed by either Finnell or the men working under him. Wood's employment consisted in attending to the burner when the mill was in operation, and assisting in repairing the burner at time of injury.

The plaintiff, Wood, just prior to receiving the injury, had passed under the conveyer structure and went to the boiler room, which was situated on the opposite side of the conveyer, where he had been performing his work previously. When he passed under the conveyer the first time, going to the boiler room, the men were not up over and upon said structure over him, but were 35 or 40 feet up near the burner and had not thrown any timbers or boards down at all up to that time, and there was nothing to indicate that they had any intention of so doing. Plaintiff went to the boiler room to get some mortar and upon returning passed under said conveyer, as he had previously done numerous times, and just as he emerged from under said conveyer said foreman Finnell threw down the piece of timber which struck

plaintiff on the head and injured him. The piece that struck Wood was about eight feet long, six inches by eight inches in thickness and width. No pieces had been thrown down before the one which struck Wood for a period of five minutes prior thereto. Wood heard no warning of any kind and no means were taken or adopted by said foreman or by the company to warn plaintiff of imminent danger or to prevent him being hit by said timber. The place where Wood passed under said conveyer at the time of his injury was a regular pathway which had been used for a long time prior thereto by men and teams in the employ of the company as a means of thoroughfare to go from one part of the mill grounds to another. As many as 50 men would pass under this conveyer at this place in a day, and it was well known to the company that at any time men or teams were liable to pass under this conveyer at this point in going about their work. There was no reason why the timbers could not have been transported down to the ground by means of the conveyer in the same manner in which they were transported up. Finnell was one of the regular bosses or foremen of the company and Wood had worked under him before in and about the mill when it was running, but the mill was at the time of the accident undergoing certain repairs and closed down for that purpose. At the place where the timber was thrown down upon plaintiff said structure was from about 40 to 50 feet high above the ground, and said timbers were thrown that distance from the floor of the conveyer before they reached

the ground. The timbers were thrown down from the top of the conveyer to the ground, under the orders and directions of the foreman, Finnell, he, Finnell, assisting in doing said work.

Plaintiff brought suit against the defendant to recover damages for the injuries sustained and alleged in his complaint as the acts of negligence on the part of defendant "That in doing and performing the things hereinbefore mentioned on the part of said defendant through its said foreman Finnell, and the throwing of said timber down upon the plaintiff as aforesaid, defendant negligently and carelessly failed to use reasonable care in furnishing to plaintiff a reasonably safe place in which to perform his duties, and failed and neglected to keep said place reasonably safe, to the end that plaintiff might and could perform his duties with reasonable safety, and said defendant, as aforesaid, failed and neglected to use reasonable care in doing and performing the matters and things being done and performed by said Finnell and the gang of men under him while working upon the platform alongside of said conveyer, and failed in every manner to use reasonable care in said operation, to the end that plaintiff should not be injured."

The theory of plaintiff's case being that the defendant failed and neglected to furnish and maintain a reasonably safe place within which the plaintiff was required to perform his employment, in this—

1. That the defendant carelessly and negligently failed to adopt a reasonably safe plan of work, and the plan of work outlined, superintended and performed

by Finnell, the foreman of the company, was in itself dangerous to plaintiff while he was going about his work, passing under said conveyer in the performance thereof.

2. That the defendant failed and neglected to provide any notice, barrier or protection of any kind which would prevent plaintiff from passing under said conveyer at said time, or give him notice that there was danger in so doing.

3. That defendant negligently and carelessly set men to work upon said conveyer at a point over the pathway, which it was known plaintiff was liable to pass upon, and defendant knew, or ought to have known, that if said method of work was pursued and said timbers conveyed to the ground by the means adopted, in all reasonable probability plaintiff would be injured.

Complaint is not made, and no negligence is charged as to the *manner in which the timbers were thrown down from the conveyer at said point,* but plaintiff charges that it was negligence to throw said timbers down *at all,* under the circumstances, and contends that some other method should have been adopted to have had said timbers conveyed to the ground which would not have jeopardized the lives and limbs of employes, who, pursuant to their duties, were called upon, or did use said driveway or pathway under said conveyer, of which the defendant had notice, and the condition and use of said pathway for said purpose was an implied invitation and warranty on the part of the master that all reasonable

means would be adopted to keep said pathway reasonably safe for employes while using the same in the business of the defendant.

The case was tried to the Court and jury and a verdict rendered against defendant and in favor of plaintiff for the sum of $5,000.00, upon which judgment was entered. Thereafter defendant served and filed motions for new trial and for judgment *non obstante verdicto,* it being stipulated by counsel that no question would be raised as to the jurisdiction or power of the Court to grant judgment *non obstante veredicto,* should the law, in his opinion, justify such action. The motion for new trial and motion for judgment *non obstante veredicto* were based upon the claim of defendant that the injury to plaintiff was caused by the negligence of a fellow servant, and that plaintiff assumed the risk of said injury. The Court sustained the motion for judgment *non obstante veredicto* upon the ground that the injury was caused by the negligence of a fellow servant of the plaintiff, and therefore no liability existed against the defendant, which opinion of the Court is made a part of the record in this cause, and said judgment and verdict was thereafter set aside and judgment entered for the defendant and against plaintiff, from which judgment this Writ of Error is sued out.

THE ISSUES.

Plaintiff in error contends—

I.

That the foreman, Finnell, and plaintiff were not fellow servants.

II.

That the law or rule of fellow servant has no application in the case at bar.

III.

That the cause of plaintiff's injury was not the *negligent manner* in which the timber was thrown down.

IV.

That the timber was thrown down purposely and as the result of a premeditated design on the part of Finnell, and was the exercise of a discretion on his part as to the manner in which the timbers should be conveyed and replaced upon the ground. Finnell chose the method to be adopted and in this respect he was representing the master and not performing the act of a servant.

V.

That the method pursued by Finnell in carrying out the orders of his superior was a dangerous method and plan of work, and the adoption of any plan of work, was the duty of the master and could not be delegated to Finnell and he given a right to use his discretion as to the method of work and the company thereby escape liability for the defective, unsafe and improper method and plan of work adopted.

VI.

That by reason of the adoption by Finnell, representing the master, of a dangerous, improper and

inadequate method and plan of work, which plan of work embraced the throwing of the timbers down upon the ground instead of conveying them down by other means, the place where plaintiff was performing his work, to-wit: the pathway under the conveyer, was rendered unsafe, which was the proximate cause of plaintiff's injury.

VII.

That defendant failed and neglected to provide for or give to plaintiff any warning of the imminent danger which threatened him, but invited him into a place of danger.

VIII.

That the master was negligent in placing said men to work up over the place where plaintiff was employed and performing his work, carrying on the kind of work which Finnell and his men were carrying on.

ASSIGNMENT OF ERRORS.

I.

That the Court erred in sustaining defendant's motion to set aside the verdict heretofore rendered by the jury in said cause in favor of the plaintiff and against defendant, and in vacating and setting aside the judgment rendered by the Court upon said verdict and granting judgment to defendant notwithstanding the verdict.

II.

That the Court erred in adjudging and ruling that the injury to plaintiff was caused by the negligence of a fellow servant of plaintiff.

III.

That the Court erred in holding and deciding that defendant is not liable in any manner whatsoever to plaintiff for the injury received by him alleged and pleaded in plaintiff's complaint.

IV.

That the Court erred in holding and deciding that there was no negligence suffered or committed by any one for which and for whom the defendant was responsible or liable.

V.

That the Court erred in vacating and setting aside the judgment in this cause in favor of plaintiff and dismissing the same.

ARGUMENT.

In order to lead to a thorough presentation of the questions involved, the points hereinbefore set out in detail will be considered separately as far as may be possible. At the outset, we are constrained to venture that the vast multitude of cases touching upon the question of the relation of fellow servants and the non-liability of the master for the negligence of such, and the apparent conflict of precedent and opinion among trial courts and those of last resort, is not brought about because of any lack of knowledge upon the part of such tribunals upon the law as laid down and established, but is due, most generally, to the

frailties of humankind, and a failure of the legal mind to apply the well settled law and adopted doctrine, to the given state of facts disclosed by the record in each particular case.

As a general rule it is true that the master cannot be made answerable in damages for an injury caused to one servant by the negligence of another, both being engaged in the same common employment. But it is conceded, even by the courts that most rigorously enforce this rule, that there are exceptions to it, and that it is not absolutely and invariably controlling in all cases in which a master is sued for injuries caused by the negligence of another person in the employment of the master. The decisions in the state courts of last resort relating to the rule and the exceptions to it are conflicting to a degree without parallel in any department of jurisprudence. In many jurisdictions there are exceptions to the rule based on the fact that the negligent servant was of a higher grade than the injured servant, and there are also exceptions based upon the nature of the injurious act as being one which was incidental to the discharge of functions which the master was absolutely bound to perform with reasonable care, whether he undertakes to perform them personally or deputes them to another servant.

A reading of the brief record which comes before your honors in the case at bar furnishes a glaring example of the fallacy of the doctrine of fellow servant, when the facts as gathered from the record in the case at bar are so strained as to support the position

of the trial Court that Finnell, the foreman in charge of the work in the course of which plaintiff in error was injured, was a fellow servant of the plaintiff in error. Such a finding cannot be supported by argument or authority. Before entering into a discussion of the enunciation of the courts of accredited respectability, your Honors' attention is directed to a brief resume of the facts disclosed by the record. Finnell, the foreman, who was in charge of the work of repairing the conveyer, was performing such work as the direct representative of the master. No special orders or directions were given him by the master as to how the work should be accomplished. The plan of work, the manner of doing the work, the securing of materials and the manner of placing such materials was by the master left to his sole judgment and direction. In the doing of such work he had charge of a crew of men. Plaintiff in error was not subject to the order of foreman Finnell, but was engaged under a foreman named Nelson, and was in no manner connected or associated with the work being performed by Finnell and his crew, but was of a distinctively different class of employment, and in an extremely different department of service. Manifestly the general control of Finnell over the work of the master then being accomplished and the relation which he occupied to such work, in effect supplanted him in the place of the master, and constituted him a vice principal. It is likewise manifest, and supported by text writers, by precedent and authority, that if the employer, whether individual or corporation, giving

no personal attention to the work, places it in the entire control of another, such person is regarded as a principal, and his negligence that of the principal. It is further the rule, that where the business of the master is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the individuals placed by the master in charge of these separate branches and departments of service, and given entire and absolute control therein, may properly be considered, with respect to employes under them, vice principals and representatives of the master as fully and completely as if the entire business of the master were placed by him under one superintendent. The same authorities which support the doctrine herein contended for are likewise uniform to the effect that the question whether or not the master is liable to his employe for the negligence of a co-employe turns rather upon the *character of the act* than upon the relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master. Among the established exceptions to the general rule as to the non-liability of the common employer to one employe for the negligence of a co-employe in the same service, is one which arises from the obligation of the master not to expose the servant when conducting the master's business, to perils and hazards against which he may be guarded by proper diligence upon the part of the master. It is elementary that the master cannot transfer or delegate to a servant a duty required of

him for the safety and protection of his servants, so as to exonerate himself from liability for injuries caused to another servant by its neglect or omission. The contract of service implies that in regard to these matters the employer will make adequate provision that no danger will ensue to the servant. If instead of personally performing his non-assignable duties, the master engages another to do it for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other duties, but is the neglect of the master to do those things which it is the duty of the master to perform as such.

II.

THAT THE LAW OR RULE OF FELLOW SERVANT HAS NO APPLICATION IN THE CASE AT BAR.

In Northern Pacific R. Co. v. Peterson, 162 U. S. 346, at page 353, the Court said:

"In addition to the liability of the master for his neglect to perform these duties, there has been laid upon him by some courts a further liability for the negligence of one of his servants in charge of a separate department or branch of business whereby another of his employes has been injured, even though the negligence was not of that character which the master owed in his capacity as master to the servant who was injured. In such case it has been held that such neglect of the superior officer or agent of the master was the neglect of the master, and was not that of the co-employe, and hence, that the servant, who was a subordinate in the department of the officer, could recover against the common master for the injuries sustained by him under such circumstances."

In Hoersgen v. Southwestern Portland Cement Company, Federal Reporter, Vol. 205, No. 8, September 4th, 1913, at page 881, determined by this Court, the Court said.

"When a servant is discharging some positive duty of the master—that is, doing some duty which he cannot delegate to another to escape liability for its negligent performance or omission—his liability will exist regardless of whether the negligent person was or was not a vice principal. There are many such duties, and among them is the duty of informing a servant of special or extraordinary risks connected with his services. In such case, whether the servant to whom said duty is delegated is higher or lower in the scale of employment is a matter of no importance. The duty is that of the master and he is responsible to the servant for its due and safe performance."

Mercantile Trust Co. v. Pittsburg & W. R. Co., 115 Fed. 475, 53 C. C. A. 207.

Peters v. George, 154 Fed. 634, 83 C. C. A. 408.

Louisville & N. R. Co. v. Miller, 104 Fed. 124, 43 C. C. A. 436.

In Metropolitan Redwood Lbr. Co. v. Davis, Vol. 205 Fed. Rep. No. 5, Aug. 14, 1913, p. 486, at p. 489 we find the following expression:

"The master may delegate that duty (the duty of furnishing a safe place to his employes) *but the responsibility is still his, and he must answer for the default of the person who acts in his stead.* Quoting:

Nixon v. Selby Smelting Co., 102 Calif. 463, 36 Pac. 803.

Higgins v. Williams, 144 Calif. 182, 45 Pac. 1041.

In Higgins v. Williams, 144 Calif. 182, 45 Pac. 1041, at p. 1043:

"And it is a duty which cannot be delegated to another so as to exonerate the employer from liability

to an employe who is injured by the omission to perform the duty, or by its negligent performance. In Fuller v. Jennett, 80 N. Y. 52, the court said: 'In respect to such act or duty the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury; the act or omission is the act or omission of the master irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do by selecting competent servants, or otherwise, to secure the safety of its employes.' And see Sanborn v. Trading Co., 70 Cal. 265, 11 Pac. 711, where the above language was quoted approvingly. In David vs. Southern Pac. Co., 98 Cal., 24, 32 Pac. 710, the Court said: 'If the act was one which it was the duty of the master to perform toward its servants, and one of them negligently performed it to the injury of another servant in the same common employment, then the offending servant in the performance of such duty acted as the representative or agent of his employer for which the employer is responsible.' And to the same effect are the cases of Elledge v. Ry. Co., 100 Cal. 282, 34 Pac. 720; Nixon v. Head Co., 402 Cal. 458, 36 Pac. 803; and Mullin v. Horseshoe Co., 105 Cal. 77, 38 Pac. 535."

In Nixon v. Seeley Smelting Co., 36 Pac. 803 (California) at p. 804 (bottom second column) it is said:

"This question (the question of determining whether negligence was of master or of fellow servant) must be determined, not from the grade or rank of the section foreman, but from the character of the act performed by him. If the act was one which it was the duty of the employer to perform towards its servants, and one of them negligently performed it, to the injury of another servant in the same common employment, then the offending servant, in the performance of such duty, acted as the representative or

agent of his employer, for which the employer is responsible."

In the recent case of Regan v. Parker Washington Co., 205 Fed. 692, the history of the subject of fellow servant from the earliest decision upon the subject is completely given, and in which such decisions are thoroughly referred to and discussed, the Court at page 703 adopts the following conclusion:

"We are of the opinion that the test to which the court brings us, and the one by which most, if not all, of the cases can be reconciled is 'the character of the act in respect to which the negligence occurs.' If the master is guilty of the breach of a legal duty, then he is liable, regardless of whether the breach was worked by one servant or another. A study of the opinions will show that the various phases, assumed risk, scope of employment, different departments of service, relation in business of the two employees, and whether the risk is or is not obvious, *has all given place to the nature of the act about which the injury occurs;* whether there has been a breach of some positive duty of the master; *if there has*, then the master is liable, *no matter what servant by his negligence caused the breach.*"

And again, at page 707, the Court said:

"Conditions are often deceptive, and a workman not charged with the duty of controlling conditions has a right to assume that the master in the exercise of a reasonable prudence will save him from dangers not clearly obvious and which may belong to other parts of the work."

In Northwestern Fuel Co. v. Danielson, 57 Fed. 915, we find a state of facts peculiarly applicable to the case at bar. At page 917 the doctrine contended for is supported by the following language:

"First: In removing these timbers that stood over plaintiff's head these men were delegated to

perform the personal duties of the defendant—the duty to use ordinary care to keep the place in which the servant was at work reasonably safe. *In the performance of this duty they were the representatives of the company. They were performing a duty which the master could not so delegate as to relieve it of liability, and their negligence in that respect was the negligence of the defendant.*

"Second: The danger from the negligence of these foremen in this work was a new and extraordinary risk, known to and created by the defendant after it employed the plaintiff. The plaintiff was ignorant of it. It was the defendant's duty to notify him of it, and it cannot charge him with the assumption of a risk which its own breach of duty kept him from having the opportunity to assume or escape from. A servant assumes the ordinary risks and dangers of the employment upon which he enters so far as they are known to him, and so far as they would have been known to one of his age, experience and capacity by the use of ordinary care, including the ordinary risks from the negligence of fellow servants engaged in a common employment. But he does not assume latent dangers known to the master, that are actually unknown to him. The risk of injury from the tearing down of the trestle work above him was not one of the ordinary risks of shoveling coal or removing materials from the dock beneath it when the plaintiff entered upon his employment. No one was then tearing down the trestle work; no one had been directed to tear it down; the bents above the plaintiff stood firmly upon the dock. He certainly assumed no greater risk than that of their falling of their own weight. He could not foresee that three hours later, by the master's order, they would be thrown down upon him, and he could not assume a risk that did not then exist, and that ordinary prudence could not anticipate. The defendant had placed him there to work. The place was reasonably safe. He had a right to rely upon the expectation that his master would use ordinary care to keep it reasonably

safe, and would notify him of any extraordinary risks that would likely occur. After the plaintiff had worked in this place for three hours, Mr. Stringer, the defendant's vice principal, created a new risk unknown to plaintiff. He directed the assistant foreman to take down the bents directly above the plaintiff. It was obvious to a man of the least sagacity that there was danger to the plaintiff below in loosening the timbers above him. Here was a new danger from the negligence of these servants in the performance of this new work, to which the plaintiff had not before been subject in the service he entered upon. This new and extraordinary risk the servant did not assume because he did not know about it. To him it was a latent danger. He was entitled to notice of it, and an opportunity to exercise option to leave the employment or assume the risk before he could be charged with its assumption. If one is employed to remove stone from a quarry where no powder is used, he does not assume the risk of the negligence of a fellow servant who is subsequently directed by the master, without his knowledge, to drill a hole in the quarry, charge it with powder, and fire a blast to loosen the stone. When such extraordinary risks are secretly ordered by the master after the employment is entered upon, he must be, and ought to be, held responsible for the result, unless the servant is informed, or by the use of ordinary care might have learned of the dangers (citing cases).

"Third: The negligence of the superintendent was the negligence of the defendant. We think all reasonable men must agree that the superintendent was guilty of negligence in ordering this trestle work torn down without notifying the plaintiff, his foreman or any of the men working under it that this was to be done. If the foremen were fellow servants of the plaintiff, and their negligence contributed to the injury, that did not relieve the defendant of its liability for the primary negligence of the master. The master is liable for an injury to a servant which

is caused by his own negligence and the concurrent negligence of a fellow servant.

"Railway Co. v. Callahan, 56 Fed. 988.
Railway v. Cummings, 106 U. S. 700.
Harriman v. Ry. Co., 12 N. E. 451.
Griffin v. Ry. Co. (Mass.), 19 N. E. 166.
Booth v. Ry. Co., 73 N. Y. 38.
Cone v. Ry. Co., 81 N. Y. 206."

In Pennsylvania Steel Co. v. Jacobson, 157 Fed. 656, at page 659 (Second Circuit) is found the following expression:

"Upon these facts could the jury have found the defendant guilty of negligence? An employer is bound to use reasonable care to furnish his employes a safe place in which to work. This is a continuing duty. *When changes in the servant's situation are brought about by the action of the master,* the latter is bound to warn him of the new danger, and take reasonable precaution for his safety. Here the changes in repairing the defective apparatus caused a change in Jacobson's situation, increasing his peril. The defendant, his employer, did nothing. The jury could have found that doing nothing was not doing his full duty."

In Hurley Mason Co. v. Marks (Wash.) 1911, 131 Pac. 1122, at page 1124, the Court said:

"It is claimed by the appellant that the act of Bell which caused the accident was a mere detail of the work, and in that act he was in any event a fellow servant and not a vice principal. (Citing cases.) The principle that runs through these cases is that where a vice principal is performing a mere detail of the work, and through his act or neglect a workman is injured, there is no liability on the part of the master, because in the performance of that duty he was in effect a fellow servant of the other workmen. But we think the principle of these cases is not applicable to the present case. The respondent's injury was directly due to the act of Bell in loosening the brace upon which the respondent stood at Bell's

direction and without warning from him. This was not a detail of the work but a positive act of Bell which produced the injury."

And again at page 1124 it is said:

"And, if it is the duty of the master to furnish a safe place, it is equally his duty to refrain from causing the place to become unsafe by his positive act, or that of his foreman, for which he is responsible."

The Supreme Court of Idaho, in the case of Larsen v. LeDoux, 11 Idaho 49 (81 Pac. 600), lays down the rule for which we contend in the case at bar, and enunciates the doctrine in language which unmistakably emphasizes the error of the trial Court in its reference to the rule adopted by that Court. In the case cited the Court said:

"If the act or omission that caused the injury was one pertaining to the duty the master owed to his servant, he is responsible for the manner of its performance without regard to the rank of the servant or employee to whom it was entrusted."

In Maloney v. Winston Bros., 18 Idaho 740, 111 Pac. 1080, at page 748, it is said:

"It is contended that the servant assumed the risk. The position is correct to the extent that he assumed the risk incident to the employment, but he did not assume any additional burden of risk superimposed by reason of the master's neglect of the duty that rested upon him to have the place inspected and maintained in a reasonably safe condition as a place of the kind in which the employee might work.

And again at page 749:

"It is the well established rule of law, which has been adopted in this state, that the liability of the master depends upon the character of the act in the performance of which the injury arises, and not upon

the grade or rank of the employee or fellow servant to whom the negligent act is traceable."

And again at page 751:

"Under the facts in this case and the circumstances under which the injury occurred, the nature of the place and the attendant circumstances as shown by the witnesses, we think there was sufficient evidence before the jury from which they might fairly conclude that the master, *who was represented by the shift boss*, was negligent in the discharge of his duty in inspecting and examining or failing to inspect, and in not giving such directions as were necessary in order to have rendered the place safe, and thereby avoided the injury which resulted.

In Knauf v. Dover Lbr. Co., 20 Idaho, 787, we find the following language:

"While it is true that respondent assumed the *ordinary* risk that would arise from such service, *yet, he did not assume any additional risk imposed upon him by reason of neglect of appellant in the duty that rested upon it to make the place safe.*"

In the "Pioneer," 78 Fed. 600, at page 608, the Court said:

"The employer owed it as a *personal duty* to his employes to furnish them a safe place to do their work."

In the same case is quoted approvingly the language from Herman v. Mill Co., 71 Fed 853, as follows:

"It is undoubtedly true that the master assumes the duty toward his servant of providing him with a reasonably safe place in which to work; *that this duty is a positive and personal one;* and that, if delegated to a subordinate, it remains, nevertheless, in law, the act of the master."

Bearing in mind the oft repeated statement that

the multitude of decisions upon the question under consideration, and the manifest conflict, is due to the failure to properly apply the peculiar facts arising in each particular case, the case of Texas & Pacific Railway Co. v. Howell, 224 U. S. 892, 56 L. Ed. 577, upholds the doctrine contended for upon a state of facts practically the same as involved in the case at bar. Briefly, the facts recited at page 894 show that plaintiff was digging a hole for a post under a coal chute. While he was at work the defendant put other men at work removing certain timber and planks from the floor, 12 feet above him, without his knowledge, and a piece of timber fell and struck him. From a judgment for plaintiff defendant appealed, resulting in an affirmance. Under contentions raised upon appeal, alike those here presented, the case was submitted to the jury with instructions that if the injury was due to the negligence of defendant in sending men to work above the plaintiff as a contributing cause, the defendant was liable. The Court said:

"We find nothing that requires us to reverse the judgment. It was open to the jury to find that the usual duty to take reasonable care to furnish a safe place to the plaintiff in his work remained. They well might be of the opinion that the general nature of the things to be done gave no notice to the plaintiff that he was asked to take a necessary risk. At the same time, they were warranted in saying that if the defendant saw fit to do the work above and below at the same time, it did so with notice of the dangers of those underneath, *and took chances which could not be attributed wholly to the hand through which the harm happened.* Even if Howell knew that repairs were going on overhead, that did not neces-

sarily put him on an equality with his employer, and require a ruling that he took the risk. (Citing cases).

In Richardson v. Spokane, 67 Wash. 621, at page 623, it is said:

"That it is the positive duty of the master to exercise reasonable care to furnish a safe place of work, and that the duty is a continuing one, has so often been stated by this and other courts as to require no citation of authority.

And at page 626:

"It may well be doubted whether there was any such consociation of employment between the respondent and the carpenters as to make them fellow servants within any just application of that doctrine. There was no opportunity for that mutual observation and protection which is the logical basis of the rule. 2 Labatt Master & Servant, Sec. 501."

And again at page 627:

"We have frequently stated and approved the principle that the duty of the master to provide a reasonably safe place and reasonably safe appliances for his servant is personal, and, whether this duty is performed by the principal or by his agent, whoever that agent may be and in whatever capacity he may be employed, the duty is still that of the principal. It is also well settled that, if the negligence of a fellow servant concurs with the negligence of the master, it does not excuse the primary negligence of the master for injury to another servant."

The breach of duty required of the master toward the servant in the case at bar was the proximate cause of the injuries sustained by plaintiff in error. The duty it owed him was not fully performed, and the jury properly found that the master had not done its full duty toward him. The liability does not depend in any manner upon the grade of service of a co-

employe, but upon the character of the act itself, and a breach of the positive obligation of the master.

Baltimore etc. R. Co. v. Baugh, 149 U. S. 368, 37 L. Ed. 772.
Hough v. Railway Co., 100 U. S. 213, 35 L. Ed. 612.
Northern Pacific R. Co. v. Herbert, 116 U. S., 29 L. Ed. 755.
Santa Fe Pac. R. Co. v. Holmes, 202 U. S. 438, 50 L. Ed. 1094.
New England R. Co. v. Conroy, 175 U. S. 323, 44 L. Ed. 181.

The duty of the master to provide a reasonably safe place to labor is a positive and continuing duty, and the risk the servant assumes of the negligence of a fellow servant does not exempt from that duty. If instead of personally performing these duties the master engaged another to do it for him, he is liable for the neglect of that other, which, in such case, is not the neglect of the fellow servant, no matter what his position as to other matters, but is the neglect of the master to do that which it is the duty of the master to perform as such.

Northern Pacific R. Co. v. Peterson, 162 U. S. 346-353.
Northern Pacific v. Charless, 162 U. S. 359.
New England R. Co. v. Conroy, 175 U. S. 323-338.
Baltimore & O. R. Co. v. Bough, 149 U. S. 368-386.
Chicago & R. Co. v. Ross, 112 U. S. 377-383.
Hough v. Ry. Co., 100 U. S. 213.
Gardner v. Michigan Cent. R. Co., 150 U. S. 349-359.
Union P. R. Co. v. Daniels, 152 U. S. 684-688.

The servant has a right to look to the master for

the discharge of the duty it owes him, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employe, or the servant's right to insist that reasonable precaution shall be taken to secure safety in those respects. The question turns not upon the relation of the servants to each other, but upon the nature or character of the act in the cause of which the servant is injured.

Union P. R. Co. v. Daniels, 152 U. S. 684-689.
Baltimore & O. R. Co. v. Bough, 149 U. S. 368-386.
New England R. Co. v. Conroy, 175 U. S. 323-343.

The duty the master owes to the servant is a continuing one and must be exercised whenever circumstances demand it.

Santa Fe R. Co. v. Holmes, 202 U. S. 438, 50 L. Ed. 1094.

III.

THAT THE CAUSE OF PLAINTIFF'S INJURY WAS NOT THE *NEGLIGENT MANNER* IN WHICH THE TIMBER WAS THROWN DOWN.

The record in this case, and the verdict of the jury under the instructions given, establishes defendant's negligence. The trial Court in the course of his opinion said: "I further instruct you that if the person who threw this stick of timber down upon this man, if he did it without warning, was guilty of *gross* and *criminal negligence* * * * but

if you find that the accident happened through the carelessness of the master and the fellow servant, then the master is liable. That is, if he was injured through the failure of the master to furnish a reasonably safe working place, coupled with the act of a fellow servant in throwing the stick of timber upon him." To the end that our position may be properly understood the assignment under discussion may be passed by simply suggesting that the master's liability is not sought to be predicated upon the "negligent manner" in which the timber was actually thrown down, but by reason of the fact that the timbers were permitted to be thrown down *at all.* The liability is established and the language of the Howell case (*supra*) to the effect that the master "took chances which could not be attributed wholly to the hand through which the harm happened" becomes particularly pertinent.

IV.

For the sake of brevity the assignments numbered IV., V. and VI. will be discussed under one heading. Before beginning this discussion, however, we desire to call the Court's attention to the facts found in the record, which, to our minds, readily disclose and makes manifest the absolute lack of disposition upon the part of defendant in eror to place their employes, and especially plaintiff in error, without the pale of protection against injury. It shows a manifest disposition on defendant's part to violate every duty it owed plaintiff in error, whether legal, moral or humanitarian. Can it be that the master is

permitted to escape liability by attempting to place the responsibility of his negligence upon his foreman, to whom he had delegated his positive duty? Conceding that he may so delegate his business, can he delegate his responsibility for the act of the one whom he has selected to represent him, in performing those duties which the law says the master must perform as the "master's" duty? Was plaintiff in error, engaged under another foreman, in another and separate gang of laborers, and in a distinctively different department, going about his work under instructions from the foreman of his gang, in a position in which he could have protected himself against such negligent acts? Neither argument can be made, nor precedent cited that will establish such an unwholesome doctrine as will permit of the escape from liability through the use of the term "fellow servants" nor can the doctrine be extended or have any logical application to other employes, who for any cause are not in a situation to exert such an influence on their fellows. It must follow, therefore, as an unanswerable proposition, that the cases to which this exception applies are only those where the servant receiving the injury is engaged with the servant inflicting it in a common business where he has an opportunity to exercise a preventative care over his negligence.

The timbers which were being used in making the repairs to the conveyer had been taken up by means of the conveyer. There is no reason why they should not have been returned to the ground in the same manner, except that the time of the master was

at stake. It would require more time to have taken the timbers down in the safe way, resulting in a greater expense, a somewhat more important consideration to the defendant in error than is the life or limb of an employe. Plaintiff in error was required, under instructions from his foreman, to pass under the overhead structure, and in doing so followed a regular driveway or pathway, through which roadway numerous teams passed daily and which was used daily as a passageway by upwards of "fifty men." When plaintiff in error passed through on his mission the men above were working "30 to 40 feet" nearer the burner and not directly over the driveway. The timber which was thrown from above was not the only timber which was so thrown down, but "six or eight" had been so thrown.

The timbers had been carried back from the burner and thrown down directly over the driveway beneath the conveyer or trestle without warning of any kind. Argument is unnecessary to convince that such a course could only result in injury to some one whom the master must have anticipated would lawfully and properly use the driveway, under the implied invitation and command of the master, and that the master failed in the performance of that duty which devolved upon it not to jeopardize the lives and limbs of its employes, whose duties, in obedience to the master's call, might be directed, as was plaintiff in error, to use the driveway or pathway beneath the conveyer. The vice lay in the negligent methods pursued, the defective and dangerous place of work,

the lack of warning, and the breach of the legal duty which the master owed to its servants not to expose them to extraordinary dangers and hazards, and in directing plaintiff in error to a place, which can only be properly characterized a "veritable death trap."

A most important consideration which we desire to impress upon your honors is the fact that at least five minutes elapsed between the throwing down of each piece of timber. Thus, much time was consumed in throwing all of the timbers down, and the claim cannot be made that plaintiff's injury was the result of a spasmodic act of negligence. The negligent course of conduct was the result of the master's negligence, followed for some time, and was the result of a defective and dangerous method of work, done and performed with the master's knowledge, or continued for a length of time sufficient to have enabled the master to ascertain the method being used, or a length of time sufficient to establish the negligence of the master in failing to secure such knowledge.

In Hoersgen vs. Southwestern Portland Cement Co., Federal Reporter, Vol. 205, No. 8, Sept. 4, 1913 (this Court) the Court adopts the following language at p. 881:

"A qualification of the general rule which is relevant here has been recognized by authorities which are controlling in this court. It is, in brief, that when the one guilty of negligence has such general control and occupies such a relation to the business in connection with which the injury occurred that he takes the place of the master, he is held to be a vice

principal * * * a representative of the master * * * and not a fellow servant, and the principle of this general rule is carried further. When the business of the master is so large and diversified that it naturally divides itself or is divided into departments of service, the individuals placed by the master in charge of separate departments or branches of service and given entire control therein are properly to be considered in respect to employes under them vice principals—representatives of the master."

Northern Pacific vs. Dixon, 194 U. S. 338, 344.
Baltimore & O. R. Co. vs. Baugh, 149 U. S. 368, 383.
Northern Pac. R. Co. vs. Peterson, 162 U. S. 346.
Alaska U. Q. W. Co. vs. Muset, 114 Fed. 66.
Klauder vs. Welden D. M. Co., 183 Fed. 962, 106; C. C. A. 302.

In the course of the trial Court's opinion in sustaining the motion of defendant in error for judgment (transcript p. 24), the case of Donnelly vs. San Francisco Bridge Co., 49 Pac. 359, is cited, but manifestly the conclusion there reached supports the contention of plaintiff in error. At p. 561 the Court said:

"If the act was one which it was the duty of the employer to perform towards its servants, and one of them negligently performed it to the injury of another servant in the same common employment, then the offending servant in the performance of such duty acted as the representative or agent of his employer, for which the employer is responsible." (Citing):

Elledge v. Railway Co., 100 Cal. 282, 34 Pac. 720.
Nixon v. Lead Co., 102 Cal. 458, 36 Pac. 803.
Mullin v. Horseshoe Co., 105 Cal. 77, 38 Pac. 535.

Railway Co. v. Needham, 63 Fed. 107.
Railroad Co. v. Baugh, 149 U. S. 387.

And again at p. 561:

"The liability of the appellant is to be determined by the character of the act through which the injury was sustained, or of his functions in reference to the act, and not by the rank or station of the employe under whose direction the act was performed. Where the negligence is in an act which the master must personally perform, the person to whom he delegates its performance is his agent, and the master is responsible for the negligence."

In Baird v. Reilly, 92 Fed. 884, 35 C. C. A. 78, where plaintiff was injured by the caving of a trench, with the cutting of which he had nothing to do, but in which he had been directed to lay pipes, and it appeared that a competent foreman had been placed in charge of the work, provided with all necessary materials for the protection of the side walls, but had not used them at this point because he thought they were not necessary, the Court said:

"An employer is not relieved from responsibility to an employe who has been injured in consequence of his failure to make the working place reasonably safe, by proof that he employed a competent superintendent or foreman, supplied him with the necessary appliances, and gave him all needful instructions for the purpose. He cannot escape responsibility by delegating his duty in this behalf to another, because it is his implied contract with the employe that he will see to it that the working place is reasonably safe, in view of the character of the work to be performed, and this obligation is not satisfied by devolving it upon a subordinate."

In the Magdaline (D. C.), 91 Fed. 789, Judge Thomas said as follows:

"A master may not place his servant at a work made dangerous by the nature of the work of other servants, without due effort to furnish adequate protection, and, when injury arises, escape upon the plea that, but for the negligence of a co-servant or third person employed on the premises, the injury would not have happened."

In the Pioneer (D. C.), 78 Fed. 600, 609, decided by this Court, opinion by Judge Morrow, it is said:

"In the view taken by the court, no question of the negligence of a fellow servant can arise in this case. The injury to respondent, under all the facts of the case, arose by virtue of the breach on the part of his employes, the petitioners, of a personal duty which they impliedly owed him, to see to it that the places on the vessel in which he was compelled in the course of his employment, and by reason of the nature of his duties, to proceed to and from, should be reasonably safe and free from danger; and having failed to fully perform and discharge this personal duty, it is such negligence as entitles respondent to recover for the damages he proximately sustained thereby.

"The defendant failed and neglected to provide for or give to plaintiff any warning of the imminent danger which threatened him, but invited him into a place of danger."

The facts hereinbefore referred to evidence the existence of the pathway and driveway through which plaintiff in obedience to his master's directions was attempting to pass at the time of his injury, and the facts are likewise undisputed that no rules were promulgated or enforced to promote the safety of plaintiff. Had the master made and enforced a reasonable rule for the conduct of the work, to the end that some warning might have been given that the timbers were to be thrown to the ground immediately over

the driveway through which plaintiff was directed to pass, then the accident would not have happened. This duty is the absolute duty of the master, and the master is responsible for the conduct of any agent or servant to whom he delegates it.

In Western Electric Co. v. Hanselmann, 136 Fed. 564, 69 C. C. A. 346, at page 348, it is said:

"In the case at bar, however, the facts call for the application either of the well settled rule that a master is liable when he either fails to provide for giving warning of danger or entrusts the duty of giving such warning to an employe so engrossed with other duties that he could not properly and efficiently give the necessary warning, or of the other equally well settled rule, established by oft' repeated decisions in this and other circuits, that when the perils to be apprehended arise either from outside and independent conditions, or from the doing of other extraneous work by defendant's servants, distinct and separate from the work in which the servant is engaged, the master is bound to employ the necessary means to give timely warning of such danger, and that he cannot delegate his duty to any other person, so as to relieve him from liability for the negligent failure to give such warning."

See also:

Toledo B. & M. Co. v. Bosch, 101 Fed. 530, 41 C. C. A. 482.
Orman v. Salvo, 117 Fed. 233, 54 C. C. A. 265.
McGoven v. C. V. R. Co., 123 N. Y. 280, 25 N. E. 373.
Bellville S. Co. v. Baker, 39 L. R. A. 834.

In Ellis v. N. P. Ry. Co., 103 Fed. 416, at p. 417, we find the following:

"The duty of exercising reasonable care in furnishing to a servant a reasonably safe place to work is that of the master, and he cannot delegate his duty

to a subordinate without placing such subordinate in his own position, and binding him to perform the same duties devolving upon him (the master). McKinney Fel. Ser. p. 73, Sec. 28, citing Hough v. Ry. Co., 100 U. S. 213, 25 L. Ed. 612.

See also:

Armann v. Galkowska, 66 N. E. 1037, 1039.
Williams Grover Tank Co. v. O'Donnell, 60 N. E 831, 832.
Woods v. Lindwall, 48 Fed. 62.
Thompson v. Sterrett Co., 149 Fed. 721.
Choctaw v. O. & G. R. Co., 191 U. S. 64.

Again recalling the language of Judge Thomas, in the Magdaline (D. C.), 91 Fed. 789: "A master may not place his servant at a work made dangerous by the nature of the work of other servants, without due effort to furnish adequate protection, and, when injury arises, escape upon the plea that, but for the negligence of a co-servant or third person employed on the premises, the injury would not have happened," and applying the principles enunciated to the facts in the case at bar, we confidently assert that a consideration of the questions involved should lead to the reversal of the order sustaining the motion of defendant in error for judgment *non obstante veredicto*. and that the verdict of the jury and judgment heretofore rendered should be reinstated.

Respectfully submitted,
W. H. PLUMMER and
JOSEPH J. LAVIN,
Attorneys for Plaintiff in Error.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

Ninth Judicial Circuit

M. C. WOOD,
Plaintiff in Error,
vs.
POTLATCH LUMBER COMPANY, a corporation,
Defendant in Error.

No. _____

ANSWERING BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the United States District Court for and within the Eastern District of Washington, Northern Division.

STATEMENT OF THE CASE.

There is no conflict in the testimony of this case. The material facts are as follows: The defendant owns and operates a saw mill plant at the town of Potlatch in the state of Idaho. A conveyer leads from the mill to a burner situate about one hundred and twenty-five feet distant from the mill in which waste and refuse matter is carried from the mill to the burner and consumed. This conveyer leaves the mill about four feet above the ground and enters or connects with the burner at a height of forty-five or

fifty feet from the ground. The conveyer has a railing and footwalk on either side, is about eight or ten feet in width, and is supported by wooden bents sixteen feet apart. At the time the plaintiff received the injuries complained of, the mill was closed down for repairs. About three days before the accident three workmen were directed by the superintendent or millwright to make certain repairs on a sprocket-wheel at the end of the conveyer next to the burner. To accomplish this work it became necessary to erect a scaffold, and for that purpose a number of timbers, estimated at from six to ten, were carried up from the mill over the cenveyer to the burner. After the repairs on the sprocket-wheel were completed these timbers were taken down and carried back down the conveyer to a point about twenty-five feet from the burner and perhaps thirty feet above the ground. During this same period of three days the plaintiff and another crew of workmen were engaged in making certain repairs within the burner, the plaintiff mixing the mortar which was used for that purpose on the outside of the burner. On the morning of the accident the plaintiff found it necessary to go from his place of work to the boiler or engine room in search of lime, and in so doing passed under the conveyer between two of the supporting bents at a point about twenty-five or thirty feet distant from the burner and directly beneath the timbers which had been used in the scaffold and removed to that point. On his return one of the men engaged in making the repairs on the sprocket-wheel threw one of the timbers which had

been removed from the scaffold to the ground below, striking the plaintiff and caused severe and permanent injuries to his head. For the injuries thus received a recovery of damages is sought in this action. It may be further stated that one of the men making the repairs in the burner was in charge of the crew there employed, and one of the men engaged in making the repairs on the sprocket-wheel was in like charge. These two men are referred to in the testimony as straw bosses, and it was the man in charge above who threw the stick of timber that caused the injury.

The sufficiency of the testimony to support a verdict is the only question involved.

ARGUMENT AND AUTHORITIES.

The negligence complained of by plaintiff in his complaint is the failure on the part of the defendant to furnish him with a reasonably safe place in which to work, and the failure to warn of the dangers. In the court below plaintiff relied upon the fact that Fennell, the man who threw down the timber in question, was a foreman, or vice-principal, for whose negligent act the defendant was liable. The trial court held that Fennell was a fellow servant of plaintiff for whose negligence the defendant was in no wise responsible, and as plaintiff's injury was due solely and alone to the negligent act of Fennell, the trial court denied a recovery. It is evident from plaintiff's brief that in order to avoid the force of the opinion of the trial court to the effect that the negligence of Fennell

was the proximate cause of the injury, and that he was plaintiff's fellow servant, a different theory is now relied upon and presented. If we correctly grasp plaintiff's present theory, it is this: the work which Fennell and the men working under him were performing was of such a character that it required defendant to adopt some specific plan or method for doing the work, or, stated in another way, this work was of such a character that the defendant could not turn it over to Fennell and allow him to use his judgment and common sense in selecting a method for doing the work without rendering itself liable to another employe who might be injured by the negligence of Fennell in selecting the proper method. This contention cannot be sustained. That plaintiff and the straw boss, or foreman, Fennell, who threw down the timber which caused plaintiff's injury, are fellow servants, is established beyond controversy by the following decisions:

Alaska Treadwell G. M. Co. vs. Whelan, 168 U. S. 86, 42 Law ed. 390;
N. P. Ry. Co. vs. Charles, 162 U. S. 359, 40 Law ed. 999;
Central Ry. Co. vs. Keegan, 160 U. S. 259, 40 Law ed. 418;
Martin vs. Atchison Ry., 166 U. S. 399, 41 Law ed. 1051;
N. P. Ry. Co. vs. Dixon, 194 U. S. 338, 48 Law ed. 1006;
Baltimore Ry. vs. Baugh, 149 U. S. 389, 37 Law ed. 781;
Bentler vs. Grank Trunk Ry. 224 U. S. 84, 56 Law ed. 679;
Texas Ry. vs. Bourman, 212 U. S. 531, 53 Law ed. 641.

The plaintiff was engaged in working in and about the burner in question and so was Fennell. They were engaged in the same general undertaking, and in the same department of the defendant's business. The testimony of Fennell shows that he was the boss in charge of the men fixing the sprocket-wheel at the end of the conveyer. That Charles Hibbard was foreman in charge of the entire work, and that Mr. Seymour was superintendent over Mr. Hibbard (36, 37). The witness Albert testified that Mr. Laird was in charge over Mr. Seymour. On page 33 of the transcript he testified as follows:

> "Mr. Laird would give his instructions to the superintendent, the superintendent would give the instructions to the foreman, and the foreman would give the instructions to the men working under him, and while I was up there working with the other men Mr. Fennell told us two men what to do."

Again at page 34 he testified as follows:

> "I knew Mr. Wood as I had worked with him before. He was working under a boss by the name of Mr. Nelson. He and Nelson were working for some days doing mason work, repairing the burner itself, using lime, brick and like materials."

Under this state of facts, which was proven by the plaintiff himself, the plaintiff and Fennell were fellow servants within the rule announced in the above cases. With reference to the work which he was delegated to perform, Fennell testified (36, 37):

> "Mr. Charlie Hibbard, the foreman of the

mill, sent me up there and told me to take charge of these men and do this work. He, Charlie Hibbard, the mill foreman, had charge of everything around there. Hibbard told me to go up to the top of the burner and remove a sprocket-wheel in the end of the conveyer and put in a sheave in its place. Hibbard did not give me any other instructions. In order to do this work it was necessary to take some lumber up there from the yard to the top of the conveyer and there build a scaffold and afterwards to replace the lumber down on the ground. This was all left for me to do and to have charge of."

With reference to how the timber was taken down, the witness Albert testified as follows (31, 32, 35):

"We had hauled some timbers up to build a scaffold. These timbers were taken from the ground down below and conveyed by the conveyer up to the burner, where we took them off and built a scaffold so as to be up high enough to put in a new sheave wheel, adn just before the accident happened we had completed this work, and was tearing the scaffold down, and under instructions from Mr. Fennel I was taking the scaffold apart, and the different timbers and lumber was put in hte conveyer, where it was conveyed down to the point on the conveyer up over the place where Mr. Wood was injured. The distance we took the lumber down where the scaffold had been built was about 25 or 35 feet. There were six or ten large pieces of timber that we placed on the conveyer platform under orders of Fennell, from which point they were afterwards thrown down upon the ground. I had not thrown any pieces down on the ground myself, but Fennell and the other man had thrown down about six or eight pieces. The piece that struck Mr. Wood was about eight feet long and six inches by eight inches in thickness and width. * * *

There was no reason why the timbers could not have been continued down upon the conveyer to the ground the asme as they had been brought up, and the timbers were being thrown over the side by the orders of Mr. Fennell who was in charge of the work. Mr. Fennell himself threw down the one that struck Mr. Wood. * * * We were working up close to the burner a short time before the accident and when we got through there we were supposed to take out lumber and throw it down on the ground. This was Fennell's orders. We were not working three days right above and over the place where Wood was hurt but were working up near the burner a distance of 25 or 30 feet from where the timbers were afterwards thrown down on the ground. Fennell and 'Shorty' were only at the place on the conveyer above and over where Wood was walking at the time of his injury just a few minutes before he was hurt. In fixing this sprocket-wheel the sprocket-wheel was up near the burner and we worked there three days until we got through working on this scaffold and then we tore the scaffold down and brought the lumber down to the place where it was afterwards thrown over the other side down upon the ground."

Fennell testified with reference to throwing the timber as follows (44):

"I threw the stick down that must have struck him. I never saw him there at all until after he was hit. There was nothing to prevent me from replacing these timbers on the ground down below by using the conveyer or by letting the same down with ropes, or by throwing the same down at some other point. The pieces were being thrown down by my orders, but I did not know there was anybody down there who would be liable to be hit."

This work which was being done, as appears from the testimony above quoted, was of a very simple character. The act of lowering several pieces of timber from the conveyer to the ground was one which did not require the supervision of the master, and one which he could delegate to a competent servant. It is to be remembered that the plaintiff nowhere charges in his complaint that Fennell was incompetent or that the defendant was negligent in employing him; neither is it charged that the defendant was negligent in failing to supervise the work in question. The question therefore presented by plaintiff's brief is whether or not the defendant could delegate to Fennell, whose competency is in no way question, the supervision and adoption of a method of doing the work here in question. Under the authorities this question must be answered in the affirmative. That plaintiff's place of work was reasonably safe, except for the negligent act of Fennell, must be conceded. The method of getting these timbers down to the ground was a simple detail of the work which the defendant could delegate to Fennell, and rely upon his good judgment and common sense to use such precautions as were necessary for the safety of his fellow servants.

In Deye vs. Lodge & Co., 137 Fed. 480, every contention which is here made by plaintiff was urged and rejected by the court. In that case it appears that plaintiff was injured while engaged with others in moving a large iron casting by the falling of one or more similar castings from a pile adjacent to the

casting being removed. There was no claim that the foreman Lutz was incompetent, but it was contended that the defendant should have adopted some method or plan for doing the work and not delegated this to the judgment of a foreman. In passing upon the case the court, speaking through Judge Lurton, said:

> "The general fitness and competency of Lutz, the foreman, who is said to have negligently piled the castings which fell and injured Deye, was not questioned. That Lutz and Deye were fellow servants, and that each assumed, as part of the risk of the business, the risk of the negligence of the other and of the other workmen engaged in and about the castings and cleaning branch of the defendant's business, is equally undisputable. The case must turn, therefore, upon the question as to whether the place of work was dangerous through neglect of any personal duty imposed by law upon the employer. The contention is that the place where Deye was called upon to work when hurt was a dangerous place, by reason of its proximity to a pile of castings which were liable to slip and all because not properly piled, with strips of wood between them. The place was safe enough, except in so far as it was made unsafe by the system or manner in which these castings were piled. There was evidence tending to show that these beds would not have been so liable to slip and fall if sticks of wood had been placed between the castings when being piled up, and that it was the practice of some shops and founderies to interpose pieces of wood to guard against slipping or falling. There was also evidence tending to show that no wood had ever been used or supplied for that purpose, nor any direction given by the defendant in error concerning the method of piling such castings. No other instance of the falling of such castings in this or any other shop was shown, nor did the foreman make any request for

strips of wood to use when stacking them up, although he testified that he knew the danger and practice of using such strips in other shops in which he had worked.

Was the defendant company under any duty to supervise the method of piling such castings, or was that a detail of the business which might be left to the judgment of the men whose business it was to receive, pile and handle them? The system or manner in which they were piled when received from the foundry, and kept until needed for use in the machine shop, was one adopted by Lutz and those who were his fellow servants in this branch of the business. *The case must therefore turn upon the question as to whether the defendant company, as the employer, owed any non-delegable personal duty in respect to supervising the methods adopted by Lutz and his fellow workmen, of whom Deye was one, for stacking, storing, or piling these rough castings.*

That an employer engaged in a compilcated and dangerous business is under obligation to prescribe rules for its orderly and safe conduct is a well-settled principle of the law of master and servant. B. & O. R. R. vs. Doty (C. C. A.), 133 Fed. 866; Woods, Law of Master & Servant, Sec. 403; Shearman & Redfield on Negligence, Sec. 202; Slater vs. Jewett, 85 N. Y. 61, 39 Am. Rep. 627. *But this rule presupposes a complicated business, involving danger to those conducting it unless it be managed upon some prescribed system.* A railway business is an example. The general business conducted by the defendant corporation may, in some of its aspects, be one of such complexity and danger as to require its conduct according to system or rule, having regard to the safety of its servants. But the matter we have to deal with is the simple question of receiving and piling rough, heavy castings in a room devoted to their storage until cleaned and

needed in the machine shop. These castings had been made in the foundry. The next step was their transportation from the foundry to the place where they were to be kept and cleaned, and piled to wait their removal to the machine shop, to be there converted into a great tool by skilled men. The work which Lutz and the men under him, including Deye, were engaged to do, was the work of receiving, piling, and cleaning these and other castings; and if they were negligently piled, it was because a part of the very work which they were employed to do was done in a negligent manner. It is true that Deye had not helped receive or pile these lathe beds; true, he had not before been required to assist in lifting one for removal to the machine shop. Nevertheless, his employment involved every phase of the work superintended by Lutz. *We say, therefore, that the mere detail of how these castings should be piled was a part performance of the work itself, the risk of which he had assumed. Lutz was an experienced foreman. He was, in law, the fellow servant of the plaintiff; and his neglect, if his failure to properly pile these castings be regarded as negligence, was the negligence of a fellow servant, unless the method or manner of piling them constituted so complex or dangerous a matter as to require the active and personal direction or supervision of the master. But we are not able to bring ourselves to the conclusion that the circuit judge erred in holding that there was anything in the nature of this part of the work intrusted to Lutz and his fellow servants as to make it the personal duty of the defendant company to lay down a rule or system for piling them, or to personally superintend the manner in which the men engaged in the work should do that part of it. If such a matter is not a detail of the general business which may be intrusted to the judgment and common sense of the men whose business it was to receive, pile and handle such castings,*

there is no detail which indirectly involves the safety of the place where work is being carried on which must not be personally supervised. Unless the business be of such a complex and dangerous character as to require that it shall be conducted upon a system or scheme, in order to secure the orderly conduct of the business and the safety of those engaged in it, the master's obligation to supply a safe place for his work to be done, and to keep it safe, does not impose the duty of always keep it in a safe condition so far as its safety depends upon the proper performance of the very work which his servants have there undertaken ot do. *If a negligent manner of doing the work makes the place less safe, that is one of the risks which all engaged in the work have assumed as a risk of the occupation.* If it was the duty of the defendant company to see that Lutz used sticks in piling these castings while waiting the next step in the work upon them, it would be hard to say why it would not be equally the duty of an employer to supervise the temporary piling or storing of brick or lumber or stone or barrels or boxes containing the material to be used by the men upon the premises. *Matters of this kind are not so complex or dangerous as to demand the direct supervision of the master, but are details which, from a reasonable consideration of the rule of master and servant, may be and must be left to the common sense of the men doing the work, as one of the risks of the business.* Cullen vs. Norton, 126 N. Y. 1, 6, 26 N. E. 905; Morgan vs. Hudson River O. Co., 133 N. Y. 666, 31 N. E. 234; Perry vs. Rogers, 157 N. Y. 251, 51 N. E. 1021. Although it is the duty of a railway company to give correct orders for the running of its trains, and the train dispatcher stands for and represents the master in this matter, yet, if he gives an order which brings on a collision, by reason of the negligence of a local telegraph operator in falsely reporting the

passing of a train, the company is not liable to trainmen injured in the collision, such local telegraph operator being, in respect to the matter, the fellow servant of the men injured. Ill. Cent. Ry. vs. Bentz, 40 C. C. A. 56, 99 Fed. 657; N. P. R. Co. vs. Dixon, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. ed. 1006.

The conclusion we reach is that the place where the plaintiff was injured was only dangerous because of the negligence of his fellow workmen in the manner of carrying on the work, the risks of which he had assumed. Armour vs. Hahn, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. ed. 440; Finalynos vs. Utica M. Co., 67 Fed. 507, 14 C. C. A. 492; Galow vs. C., M. & St. P. Ry., 131 Fed. 242, 65 C. C. A. 507; Cleveland, etc., Ry. Co vs. Brown, 73 Fed. 970, 20 C. C. A. 147; Liermann vs. Milwaukee Dock Co., 110 Wis. 599, 86 N. W. 182."

The facts in the case at bar show that the work which was being performed was as simple in character as the work which was being performed in the Deye case, supra, and under the authorities cited in that case, it is clear that the master is under no obligation to adopt a method or to supervise the manner in which simple work of this character is done, but that this may be delegated to a competent man such as Fennell was in the case at bar.

In Central Railway vs. Keegan, 160 U. S. 259, 40 L. ed. 418, it appears that Keegan, together with several other men, was employed by the Railway Company in its yards. It was claimed that the accident was due to negligence on the part of O'Brien, and that his negligence was of such a character as to ren-

der the railway company liable. The court held, however, that these men were fellow servants, and in the opinion delivered by the present Chief Justice White, the court said:

> "Applying the principles announced by this court and the supreme court of New Jersey to the facts of the case at bar, it is clear that O'Brien and Keegan were fellow servants. O'Brien's duties were not even those of simple direction and superintendence over the operations of the drill crew; he was a component part of the crew, an active co-worker in the manual work of switching, with the specific duty assigned to him by the yardmaster of turning the switches. He was subordinate to the yardmaster who had jurisdiction over this and other drill crews, and it was the yardmaster who employed and discharged all the workmen in the yard, giving them their general instructions, and assigning them to their duties. O'Brien's control over the other members of the drill crew was similar to the control which a section foreman exercises over the men in his section; and, following its construction of the decisions of this court, in Baltimore & O. R. Co. vs. Baugh, 149 U. S. 368 (37:772), and Northern P. Ry. vs. Hambly, 154 U. S. 349 (38: 1009), the circuit court of appeals for the eighth circuit has held that a section foreman is a fellow servant of a member of his crew, and that one of the crew, injured by the negligence of the foreman, cannot recover. Kansas, etc., Co. vs. Waters, 70 Fed. 28.
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> In Potter vs. N. Y., etc., Co., 136 N. Y. 77, employes of a railroad company, while switching cars in the company's yard under the direction of a yardmaster, shunted a number of cars onto a track so that they collided with a car being inspected, and caused the death of the inspector. It was claimed that the proper and reasonable

care required that there should have been a brakeman on the front of the cars to control in an emergency their motion when detached from the engine. In the absence of allegation of proof to the contrary, the court presumed that competent and sufficient servants were employed, and proper regulations for the management of the business had been established, and observed (p. 82):

It is quite obvious that the work of shifting cars in a railroad yard must be left in a great measure to the judgment and discretion of the servants of the railroad who are intrusted with the management of the yard. The details must be left to them, and all that the company can do for the protection of its employes is to provide competent co-servants, and prescribe such regulations as experience shows may be best calculated to secure their safety.

We adopt this statement as proper to be applied to the case at bar. *A personal, positive duty would clearly not have been imposed upon a natural person, owner of a railroad, to supervise and control the details of the operation of switching cars in a railroad yard, neither is such duty imposed as a positive duty upon a corporation; and if O'Brien was negligent in failing to place himself or someone else at the brake of the backwardly moving cars, such omission not being the performance of a positive duty owing by the master, the plaintiff in error is not responsible therefor."*

If it was not the duty of the railway company in the Keegan case, to supervise and control the details of the operation of switching cars in its railroad yards, it is difficult to conceive how it can be contended that it was the duty of the defendant, in the case at bar, to supervise and control the details of lowering these few

timbers to the ground, particularly in view of the fact that plaintiff's own witnesses testified that the timbers could be safely conveyed to the ground either upon the conveyer or by ropes. The master had a right to assume that Fennell would adopt a reasonably safe method.

In American Bridge Co. vs. Seeds, 144 Fed. 605, it appears that the plaintiff was directed by the foreman to go to a certain point upon the work and hook a chain, and that in doing the work the plaintiff walked across a certain stringer upon planks, and then along the stringer to about the middle of the chords, where he wrapped the chain around the chords and hooked it, and waited until he saw it would not become unhitched. There was a signal in use which was called the "high ball," which signified that the load should be raised rapidly. As soon as the plaintiff saw that the hitch would hold he walked along the stringer to the plank for the purpose of returning. As soon as he left the hitch the foreman gave the signal called the high ball, and the load was rapidly raised, and swung around and knocked the plaintiff off the plank and injured him. The court held that this was the negligence of a fellow servant; and it must be conceded, we contend, that the method of doing the work in that case rendered the working place of the plaintiff unsafe to the same extent as did the method adopted by Fennell in the case at bar render the working place of the plaintiff unsafe. The court held that the foreman and the plaintiff were fellow servants, and that the plaintiff's injury, being

due to the negligence of the foreman, there could be no recovery. In passing upon the question of whether or not the master should anticipate negligence on the part of his servants, the court said:

> "There is no duty imposed upon a master to anticipate breaches of duty on the part of his servants, but he may lawfully reckon the natural and probable result of his actions upon the supposition that his servants will obey the law and faithfully discharge their duties. The legal presumption is that they will do so, and this is the only practicable basis for the measurement of the acts, rights or remedies of mankind. Little Rock & M. R. Co. vs. Barry, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349; Cole vs. German Sav. & L. Soc., 59 C. C. A. 593, 124 Fed. 113, 63 L. R. A. 416. Mr. Justice Holmes in delivering the opinion in Burt vs. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 6, 13 L. R. A. 97, said:
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> > 'Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong, and he is not bound to anticipate the general probability of such acts, any more than a particular act by this or that individual.' "

The court further held in that case that the risk that a safe place might become dangerous or unsafe, because of the negligent act of the fellow servants employed in carrying on the work, was one of the ordinary risks which the servant assumed. In its opinion the court said:

> "The risk that a safe place will become unsafe, or that safe machinery will become dangerous, by the negligence of the servants who use them, is one of the ordinary risks of the employment

which the servants necessarily assume when they accept it. *It is a risk of operation and not of construction or provision, and the duty to protect place and machinery from dangers arising from negligence in their use is a duty of the servants who use them, and not that of the master who furnishes them.* A railroad and its equipment is a place to labor and a machine with which to perform work. Originally safe, it is made dangerous by the failure of a servant engaged in operating a train to properly turn a switch (St. Louis &c. Ry. Co. vs. Needham, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833); by the failure of a switchman to properly place red lights (Brady vs. Chicago &c. Ry. Co., 114 Fed. 100, 52 C. C. A, 48, 57 L. R. A. 712); by the direction of a yardmaster to an engineer and conductor to take their train over a track on which another train is standing (Penna. Co. vs. Fishack, 123 Fed. 465, 59 C. C. A. 269); by the failure of an engineer to obey his instructions which results in a collision (B. & O. R. Co. vs. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. ed. 772; Howard vs. Denver &c. Co. (C. C.), 26 Fed. 837, where Judge Brewer said: 'The true idea is that the place and the instrument must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that no negligent handling by an employe of the machinery shall create danger'); by a failure of a conductor to require his brakeman to remain on the top of a train whereby a break occurs without their knowledge (R. R. Co. vs. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 11 L. ed. 181); by the negligence of a conductor whereby the place where a laborer is building a culvert is made dangerous, and he is struck by the locomotive (N. P. Ry. vs. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. ed. 1009); by the act of a foreman of a gang of laborers who suddenly stops a handcar without notice and causes a collision with another immediately fol-

lowing (N. P. Ry. vs. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. ed. 994); by the disobedience of a rule which requires personal notice to workmen on certain tracks that cars are to be moved thereon (Grady vs. Southern Ry. Co., 34 C. C. A. 494, 92 Fed. 491); by the failure of an engineer and a foreman to take notice of and prevent an approaching collision of an engine and a handcar (Martin vs. Atchison, 166 U. S. 399, 17 Sup. Ct. 603, 41 L. ed. 1051); and by a thousand other acts of negligence of servants of railroad companies, which make the places where their fellow servants are employed and the machinery which they are using more dangerous. But the duty of the master does not extend to guarding the places or the machinery he furnishes against the dangers of such acts. They are violations of the primary duty of the servants.

Again, a superintendent who is a fellow servant of the workmen under him, negligently directs them to use a derrick furnished by the employer to raise heavy weights before the derrick is securely fastened in its place, and it consequently falls and injures a workman (Kelly vs. Jutte & Foley Co., 104 Fed. 955, 44 C. C. A. 274); an officer upon a ship carelessly leaves a hatchway open, and a servant falls through and is injured (Olson vs. Oregon &c. Co., 104 Fed. 574, 44 C. C. A. 51); a foreman or any other workman whom the master employs to watch and remove a rope in a derrick when it becomes worn or weak directs or permits the use of an old rope to raise a heavy weight, the rope breaks and entails injury upon a fellow workman (Vogel vs. American Bridge Co., 180 N. Y. 373, 73 N. E. 1; Johnson vs. Boston Tow-Boat Co., 135 Mass. 209, 46 Am. Rep. 458; Cregan vs. Marston, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854) in which the rule in such cases is laid down in these words: 'It is not the master's duty to repair defects arising in the daily use of the appliance

> for which proper and suitable materials are supplied and which may easily be remedied by the workmen, and are not of a permanent character or requiring the help of skilled mechanics'); McGee vs. Boston Cordage Co., 139 Mass. 445, 1 N. E. 745; Webber vs. Piper, 109 N. Y. 496, 17 N. E. 216). None of these acts constitute violations of the duty of the master. They illustrate the rule that the duty of so using a reasonably safe place and of so operating a reasonably safe machine that neither the place nor the machine shall become dangerous by their negligent use or operation is the duty of the servants who use or operate them, and not a part of the positive duty of the master. Brady vs. Chicago &c. Co., 114 Fed. 100, 52 C. C. A. 48, 57 L. R. A. 712, and cases cited supra."

In Portland G. M. Co. vs. Duke, 164 Fed. 180, the rule which we contend controls this case was stated by the court in the following language:

> "This statement makes it plain that the only negligence shown was that of the plaintiff's fellow servants. Any other conclusion would contravene the settled rule that as between master and servant, the duty of so using a reasonably safe place, of so operating reasonably safe machinery, and of so conforming to an established and reasonably safe method of work, that injury will not be inflicted negligently, is the duty of those to whom the work is intrusted, and is no part of the positive duty of the master. American Bridge Co. vs. Seeds, 75 C. C. A. 407, 144 Fed. 605, 11 L. R. A. (N. S.) 1041; Kinnear Mfg. Co. vs. Carlisle, 82 C. C. A. 81, 152 Fed. 933."

In Dill vs. Marmon, 73 N. E. 67, the Supreme Court of Indiana, in passing upon the question of

whether or not the details of simple work might be delegated to a servant, said:

"The case, so far as the matter of direction is concerned, is one where the place was rendered unsafe in the execution of the details of the service; and, since every place where an accident happens is at least momentarily unsafe, it cannot be said that that fact alone made it the duty of the master to be present in person or by representative to protect the servant. So. Ind. R. Co. vs. Harrell, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460. Appellant, in our opinion, assumed the risk that the foreman might give a negligent command relative to the handling of cars upon the siding. But even if we were to concede that the command of Haines related to a matter so esesntially new that the appellant might fairly contend that he is not debarred of a recovery under the rule, *'Volenti non fit injuria,'* yet it does not follow that, because he may not have assumed the risk, he proceeded at the master's risk. A case like this is to be broadly distinguished from one where the command comes from the master or his special representative, or where the condition is of such a permanent character as to place or appliances that the master is in default in failing to warn the servant. In such cases the latter has a right to assume, at least ordinarily, that in following a special direction he will not be carried into an extraordinary and unapprehended peril. But it is nevertheless a rule of law that a servant cannot recover compensation of a master unless he can show that his injury was occasioned by the negligence of the master or of his representative. Quincy M. Co. vs. Kitts, 42 Mich. 34, 3 N. W. 240; Ross vs. Walker, 139 Pa. 42, 21 Atl. 157, 23 Am. St. Rep. 160; 4 Thompson Com. on Neg., Sec. 3758. Of course, the master may be thrown into default, notwithstanding all the care that he may have taken to perform his duties, as respects

those obligations which are personal to himself, but, as applied to an employment not essentially dangerous, it does not admit of doubt that, having taken due care to furnish and maintain a proper place, sufficient appliances, and proper servants, he may intrust the carrying out of the details of the work to those servants. The very denial of the superior servant doctrine, which this court has steadfastly frowned upon, involves the proposition that the master is not always required to be present while the ordinary duties of the employment are being carried on. In such a case it is not the master's voice which directs the servant to perform the particular act, and the employe knows that, in the nature of things, there has been no opportunity upon the part of the master to examine and consider whether the act is dangerous, so there is no basis for the assumption that the servant has undertaken the peril at the master's risk. As applied to the question in hand, we may well adopt the following language used by the Supreme Court of Massachusetts in Flynn vs. Campbell, 160 Mass. 128, 35 N. E. 453: 'The actual danger of the moment was due to a transitory act. Under the circumstances, the rule as to instructing inexperienced hands about the hidden dangers of their employment does not apply. *It were idle to declare the rule of law to be that a master who has fully discharged every duty which belongs to him may intrust the details of the execution of a part of the business to a foreman, if we also held that whenever an accident happens from a negligent order given by the foreman the master is to be charged with a default because he did not protect the servant from the transitory peril. If it be the law that the ordinary work of an employment not essentially dangerous may be carried on by means of a foreman who directs the servants in their work, the proposition becomes a practical matter to employers, and this assurance should not be nullified by con-*

verting the foreman into a vice principal whenever an accident happens.

> We have before us the case of a foreman who worked with his men; who was not, in the sense of the law, at the head of a department, but was simply over two or three men; who was intrusted with no function which belonged to the master, but was superintending and assisting in the loading, weighing and handling of cars; and who had a man over him. We deem it clear that the master was not liable for any negligence upon the part of his foreman either in giving the order, or in failing to stop the car afterwards."

In Wagner vs. City of Portland, 67 Pac. 300, the Supreme Court of Oregon, in passing upon the question of whether or not the details of the point where certain electric wires should be detached and taken down was one which the master could delegate to the servant, in its opinion the court said:

> "Beyond this, however, we are of the opinion that, so far as developed by the evidence in this case, *the cutting of wires, and the places where they should be cut so as to take them down conveniently and with the least danger to the workmen, are details of the work, which were for the judgment, discretion, and control of the workmen themselves, and not for the master to regulate by the adoption of rules for their guidance.* Ulrich vs. Railroad Co., 25 App. Div. 465, 51 N. Y. Supp. 5; Golden vs. Seighardt, 33 App. Div. 161, 53 N. Y. Supp. 460."

In Anderson vs. Oregon Ry. Co., 28 Wash. 468, the servants were engaged in unloading rails from a flat car. It was contended that it was the duty of the master to supervise the work and give directions

in regard to the details of carrying on the work. In passing upon this point the court said:

> "The work of raising the rails a few feet and loading them on the flat car was simple, and not complicated, and any dangers connected with it were obvious to the common understanding. To do the work, and facilitate and make it easy, the men must lift and throw the rail in concert. The arrangement for doing this were mere matters of detail, to be performed by the men themselves, raising the rail. There was no duty imposed upon the master here which required the direction of the details in this simple work. There can be no fair inference from the evidence that the master assumed the direction of the details."

In 26 Cyc, 1151, the rule is announced as follows:

> "The master is not bound to protect his servants further than by providing competent fellow servants and prescribing such regulations as experience shows may be best calculated to secure their safety, and the law does not require him to oversee and supervise the details of the work."

In Labatt, Master & Servant, 2d ed. Vol. 4, Sec. 1527, the rule is announced as follows:

> "The general rule is that the master is not responsible for the errors which his servant of superior grade may commit, in regard to the choice or method for carrying out the work intrusted to his management."

In the note under this section the author cites numerous authorities, which we do not deem it necessary to reproduce in this brief.

The following cases support the same view:

Perry vs. Rogers, 51 N. E. 1021;
McGrath vs. Thompson, 80 Atl. 1105;
Tenn. Coal Co. vs. Bonner, 51 So. 144, 54 L. R. A., Note Page 108.

As stated by the trial court in his opinion in this case (page 24), the act of bringing up or taking down the few timbers used in the scaffold was a mere incident or detail of the work in which the servants were engaged, and the mode of doing this might well be left to the servants themeslves without direction or supervision on the part of the master, unless we are prepared to hold that the master must supervise and superintend every detail of the work, and every act of his servants in the course of their employment. This case cannot be distinguished in any of its features from the case of Hermann vs. Port Blakely Mill Co., 71 Fed. 853, or Donnelly vs. San Francisco B. Co., 49 Pac. 559. The testimony of the witness Albert in the case at bar shows that a warning was given when the timbers were to be thrown down (32).

The authorities cited by the appellant are distinguishable from the facts in the case at bar. In N. P. Ry. Co. vs. Peterson, 162 U. S. 345, 40 L. ed. 994, cited by appellant at page 15 of his brief, the court, in defining who were fellow srevants, said:

> "In the Baugh case it is also made plain that the master's responsibility for the negligence of a servant is not founded upon the fact that the servant guilty of the neglect had control over and a superior position to that occupied by the servant who was injured by his negligence. The rule is that in order to form an exception to the general law of non-liability the person whose neglect caused the injury must be 'one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a de-

partment.' This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case."

In the case at bar the lowering of these timbers was a mere separate piece of work, and therefore Fennell was a fellow servant of plaintiff within the rule announced in the above case.

In Hoersgen vs. Southwestern P. C. Co., 205 Fed. 880, which is the case relied upon by appellant, and decided by the Circuit Court of Appeals for the Fifth Circuit, and not by this court, as stated by appellant, it appears that the foreman with full knowledge of the dangerous condition of a scaffold, and without any knowledge of that condition on the part of plaintiff, ordered the plaintiff to ascend the ladder and get upon the scaffold, which the plaintiff did, and by reason of the absence of certain cleats the scaffold fell and plaintiff was injured. All the court held in that case was that the master had knowledge of a dangerous condition of the scaffold, and that it was the duty of the master to inform the plaintiff of that condition before ordering him to go upon the same to perform the work. The case can have no bearing whatever upon the question here involved.

Without further discussion of the cases cited by appellant, it is sufficient to state that they are all distinguishable from the facts in the case at bar. Most, if not all of them, turn upon the safe place to work doctrine, which can have no application to the facts in this case. Plaintiff's working place was safe, ex-

cept for the negligence of Fennell. Law vs. Illinois Cent. Ry. Co., 208 Fed. 869; Railway Co. vs. Hart, 176 Fed. 250. The master had a right to assume that Fennell, being a competent man, would perform the work in question, which was of such a simple character, with reasonable safety to the men employed with him. Plaintiff's injury was due solely and alone to the negligence of his fellow servants, and for that reason the judgment of the lower court should be affirmed.

Respectfully submitted,
EDWARD J. CANNON,
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Attorneys for Defendant in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

M. C. WOOD,
Plaintiff in Error,
vs.
POTLATCH LUMBER COMPANY,
a corporation,
Defendant in Error.

No. 2337

Petition of Plaintiff in Error for Rehearing

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Comes now the above-named plaintiff in error and petitions this honorable court for a rehearing of the above-entitled cause in this court. Said petition is based upon the record and files in this cause and the argument of plaintiff in error heretofore and herein presented.

W. H. PLUMMER, *and*
JOSEPH J. LAVIN,
Attorneys for Plaintiff in Error.

ARGUMENT.

We approach the subject of this petition with a great deal of hesitancy, knowing as we do, the disinclination of courts to grant petitions for rehearing of causes after arguments have once been fully presented, and we would not present this petition did we not believe that it has exceptional merit and we were not fully convinced that the court has inadvertently committed a grave error in affirming the judgment of the lower court.

In this petition we will not discuss matters that have been fully considered and embraced within the opinion of this honorable court in its decision affirming the judgment, but will confine ourselves to matters which are not covered in said opinion, but which were presented in the briefs and argument of plaintiff in error upon the hearing of this cause before this court.

In the opinion of the court filed in this cause the court say:

> "It is conceded that the act (of Fennell) constituted negligence upon the part of Fennell and that the plaintiff was free from blame, *and the only question therefore is, whether* Fennell's negligence is to be imputed to defendant."

> "The court below held that under the fellow servant rule defendant was not chargeable therewith. The plaintiff excepts to this view, and further contends that the defendant is

> negligent in not providing a safe place to work and in failing to prescribe a method or carry on the work in which the men were engaged."

In the briefs and arguments made in this cause three propositions were presented and three contentions made by plaintiff in error.

1. That Fennell was not a fellow servant with the plaintiff in error.

2. That if Fennell was a fellow servant with Wood that at the time he threw down the stick of timber his act in so throwing it down was an act of superintendence and direction and in so doing he was the representative of the master.

3. That even if Fennell was a fellow servant and at the time he threw down the stick of timber he was acting as a servant, then it was a question for the jury as to whether or not the master was or was not also negligent in placing men to work upon the conveyor at such a place, and in the performance of such work, as to make it dangerous for other employes who were required to go under said conveyor in the performance of their duties, and which negligence on the part of the master, concurred with the negligence of Fennell, and such negligence of the master contributed to the injury of plaintiff in error.

The opinion of the court is confined wholly to

the first and second propositions, and no mention is made of the third proposition.

It must be conceded as elementary law that the negligence of the master, which concurs with the negligence of a fellow servant, or which contributes to the injury of the plaintiff, renders the defendant liable, notwithstanding the immediate act which caused the injuries is an act of a fellow servant. This proposition brings this case fully and completely within the ruling of the Supreme Court of the United States in the case of Texas Pacific Ry. Co. v. Howell, 224 U. S. 577, 56 L. Ed. 892. We have just discovered in our brief in this case that the citation of the above case on page 24 of our brief is in error. In the brief it is cited as 224 U. S. 892, 56 L. Ed. 577, which we think accounts for the court not considering said case in its opinion.

The Howell case is directly in point with the case at bar and seems to be the last and most recent utterance of the Supreme Court of the United States on this subject.

In that case the Supreme Court holds, that it is a question for the jury to determine, whether or not the act of putting the men to work on top of a structure, under which other employes are required to work, or perform their duty, is negli-

gence, and a contributing cause of plaintiff's injury. This court cannot say, as a matter of law, that it *was not* a contributing cause; neither can this court say, as a matter of law, that the placing of the men at work, on top of a structure, at the place where they were working, is not an act of the master, for the reason that the Supreme Court holds that it is an act of the master and not an act of a fellow servant. If the men had not been placed to work up over the place, where it was well known plaintiff was required to travel, back and forth in the performance of his work, the timber would not have been thrown down at that place and plaintiff would not have been injured. If this court is going to follow the case of Railroad Company v. Howell, *supra,* and be governed by the instructions of the Supreme Court, in that case this court must hold that it certainly was a question for the jury, whether or not the failure of the master, to perform its full duty was a contributing cause of plaintiff's injury, and concurred with the negligence of the fellow servant Fennell, and if it so holds it must reverse this case.

Again we say the record shows that these timbers had been thrown down for a considerable period of time, until six or eight had been brought

down from the upper end of the conveyor, and thrown over the side of the conveyor, which must have taken fully half an hour according to the testimony of the witnesses, for the reason that they were thrown down about five minutes apart. Therefore, if the master, through its general superintendent, or whoever was in charge of the work generally representing the master knew, or ought to have known, or in the exercise of reasonable care and observation could have known, the dangerous work which was being carried on for half an hour, and the negligent acts of Fennell in throwing these timbers down, at a place where other employes were required to perform their duties, and who were endangered thereby, could not the jury have found that the master was negligent, in permitting the work to be carried on in this way? Could not the jury also find that half an hour's time is sufficient to charge the master with implied notice, or will the courts hold that a master or representative of the master, will be permitted to turn his back on his employes, and perform no act or duty, to find out, or observe just how the work is being carried on, or whether or not the lives and limbs of other employes are being injured by the manner in which the work is being carried on, that it has directed to be done?

This question was submitted to the jury in this case under the instructions of the court, but this court has wholly ignored this question in its opinion, which is the principal ground upon which we claim the judgment of the lower court should be reversed.

It is conceded that the work being carried on by this large saw-milling corporation is of great magnitude, numerous departments of services, numerous bosses and straw bosses. Therefore, we think it the duty of the master to see to it that his men under his direction are not so placed in the performance of their respective duties, that the work of one gang will become dangerous to the employes of another gang or class of work. If a General of an army should so place his men that they unknowingly, and without any intention on their part, should shoot each other, it certainly would be the fault of the General in command and not the negligence of any corporal in charge of a detachment. That is exactly what was done in this case. Wood was required to work at a place where he did not know, and could not have known of any danger. The men upon top of the conveyor were put to work at a place where their work endangered the person of Wood. They did not know that Wood would be injured or that he

was under the conveyor. It seems to us that it is a very inhumane and harsh rule to adopt, to say that the injury to Wood was caused solely and wholly by the negligence of Fennell in throwing the stick of timber over. Neither Fennell or his men had any right to be working up over a place where other men were required to pass and repass unless the master saw to it that some means of warning was provided to prevent him being injured.

In the Howell case, *supra,* it was not contended that the boss in charge of the men upon top of the coal chute were incompetent or that the premises were defective or unsafe immediately before or immediately after the accident, or that there was any danger other than from the falling timbers. Still the Supreme Court allowed the plaintiff to recover in that case. Neither was there any contention in the Howell case that the defendant had any reason to anticipate that the timbers and planks would be allowed to fall from the top of the coal chute down so as to injure Howell.

In the opinion of the Court in the case at bar the Court observes:

> "Suppose that Fennell had carelessly let a hammer drop while installing the new wheel, and it had fallen upon and injured the plaintiff while working below; * * * precisely the same principle of liability would be involved."

We desire to suggest in connection with this statement of the court that the above illustration is exactly what did occur in the Howell case, *supra,* and the Supreme Court said plaintiff had a right to recover, and that is all we ask this court to do in this case.

We do not desire to burden this court with unnecessary argument upon this petition, and believe that we have presented our points in such a manner as to advise the court fully of our contention and impress upon the mind of the court that in its decision in this case it has overlooked the most important contention made by us in our brief and argument heretofore filed and made.

In the case of American Car & Foundry Co. v. Uss, Eighth Circuit, 211 Fed. 862, the rule is enunciated as in the Howell case, *supra,* as follows:

> "It has been twice laid down by the Supreme Court that, if the negligence of the master in failing to provide and maintain a safe place contributes to the injury of an employe, the master is liable, notwithstanding the concurring negligence of a fellow servant of a party injured. Deserant v. Cerillos Coal Railroad Co., 178 U. S. 409, 20 Sup. Ct. 967, 44 L. Ed. 1127; Kreigh v. Westinghouse & Co., 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984."

Must this court hold as a matter of law, and deprive the jury from passing upon the question, that the injury to plaintiff in error was due solely

and wholly to the fact, that this particular piece of timber was thrown down from the conveyor upon plaintiff? Can this court say it was not open to the jury to find that the usual duty to take reasonable care to furnish a safe place to the plaintiff in his work remained? Can this court say that the jury would have no right to be of the opinion that the general nature of the things to be done, gave no notice to the plaintiff that he was asked to take a necessary risk? Will this court say that the jury would have no legal right to find, that if the defendant saw fit to do the work above and below at the same time it did so with notice of the danger to those underneath, and took chances that could not be attributed wholly to the hand through which the harm happened? These are the very points decided by the Supreme Court in the Howell case, *supra,* and if that decision is the law these questions ought to be submitted to the jury, and they were submitted to the jury in the case at bar and decided favorably to the plaintiff in error.

We desire to say in conclusion that in the practice of the writer before this court, ever since its organization, this is the first petition for rehearing that he has ever filed. We know petitions for rehearing are not favored, but we realize, and I

can say freely that the trial judge and opposing counsel realize, that it is a harsh rule of law which deprives plaintiff of recovery under the facts in this case, and the tendency of the courts and recent decisions tend to a more liberal rule of law, to the end that masters shall use every reasonable means in their power, to prevent injurying their employes, and we earnestly urge in the interest of justice to both plaintiff in error and defendant in error that this petition for rehearing be granted, and reargument had and reconsideration of the questions suggested in this petition.

Respectfully submitted,

W. H. PLUMMER, *and*
JOSEPH J. LAVIN,
Attorneys for Plaintiff in Error.

The undersigned, attorneys for plaintiff in error, hereby certifies that in their opinion and judgment the foregoing petition for rehearing is well founded in law, and allege that it is not interposed for delay.

W. H. PLUMMER *and*
JOSEPH J. LAVIN,
Attorneys for Petitioner.